93-342

Supreme Court, U.S.
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NO. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE MERCANTILE EMPLOYEES' BENEFICIARY ASSOCIATION TRUST and the WELFARE PLAN of the MERCANTILE EMPLOYEES' BENEFICIARY ASSOCIATION,

Petitioners,

v.

BANK ONE, TEXAS, N.A., formerly known as DEPOSIT INSURANCE BRIDGE BANK, NATIONAL ASSOCIATION, the WELFARE PLAN of the DEPOSIT INSURANCE BRIDGE BANK EMPLOYEES' BENEFICIARY ASSOCIATION, the DEPOSIT INSURANCE BRIDGE BANK BENEFICIARY ASSOCIATION TRUST, BANC ONE MORTGAGE COMPANY, TEXAS, formerly known as MBANK MORTGAGE COMPANY, MCORP, MCORP FINANCIAL, and MCORP MANAGEMENT,

Respondents.

Petition for a Writ Certiorari to the United States Court of Appeals For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

MAY A COURT OF APPEALS DISREGARD THE CLEARLY ERRONEOUS RULE AND REVERSE THE DISTRICT COURT'S DECLARATORY JUDGMENT THAT A BANK MAY NOT WITHOUT PROPER NOTICE AND REQUIRED FORMALITY EXCLUDE RETIRED AND DISABLED EMPLOYEES FROM COVERAGE FOR MEDICAL, LIFE AND DISABILITY BENEFITS BECAUSE THE WELFARE BENEFITS PLAN COVERS RETIRED AND DISABLED EMPLOYEES FOR MEDICAL, LIFE AND DISABILITY BENEFITS; THE BANK EXPRESSLY ELECTED TO BECOME A PARTICIPATING EMPLOYER IN THE PLAN; THE BANK REMAINED A PARTICIPATING EMPLOYER IN THE PLAN FOR OVER TWO MONTHS, THE BANK WITHDREW FROM THE PLAN AND ESTABLISHED A SUCCESSOR WELFARE PLAN THAT PROVIDED THE SAME WELFARE BENEFITS; THE BANK NEVER TOOK EFFECTIVE STEPS TO EXCLUDE THE RETIRED AND DISABLED FORMER EMPLOYEES FROM COVERAGE; THE BANK ILLEGALLY SOUGHT AND WITHHELD WELFARE PLAN FUNDS FOR THE PURPOSE OF UNLAWFULLY BENEFITTING THE FEDERAL DEPOSIT INSURANCE CORPORATION; AND THE BANK MADE REPRESENTATIONS REASONABLY RELIED UPON BY THE WELFARE PLAN ADMINISTRATOR TO THE DETRIMENT OF THE PLAN?

MAY A COURT OF APPEALS REVERSE A DISTRICT COURT JUDGMENT AND ORDER DISMISSAL OF THE CASE BELOW WHEN UNOPPOSED AND UNCONTROVERTED ALTERNATIVE RELIEF HAS BEEN PROPERLY SOUGHT IN THE EVENT OF DENIAL OF THE PRIMARY RELIEF?

MAY A COURT OF APPEALS STAY A DISTRICT COURT JUDGMENT PURSUANT TO 12 U.S.C. § 91 WHEN NO ATTACHMENT, INJUNCTION OR EXECUTION HAS BEEN SOUGHT OR THREATENED ON THE JUDGMENT; TWO OF THE PARTIES FOR WHOSE BENEFIT THE JUDGMENT IS STAYED ARE NOT BANKS; THE JUDGMENT IS A NON-MONETARY DECLARATORY JUDGMENT FOR ADMINISTRATION OF ERISA WELFARE PLAN BENEFITS; FUNDS FOR SUCH WELFARE BENEFITS ARE NOT PROVIDED BY THE BANK BUT BY AN INDEMNITOR THAT IS NOT PARTY TO THE SUIT OR JUDGMENT?

MAY A COURT OF APPEALS ON A PARTIAL RECORD RELY ON A FEDERAL STATUTE TO STAY A DISTRICT COURT JUDGMENT BY UNPRECEDENTED (AND UNPUBLISHED) ORDERS THAT SHOW THE COURT CONSIDERED NEITHER THE TEXT NOR THE POLICY OF THE STATUTE; THEN REFUSE TO GIVE PROPERLY SOUGHT INSTRUCTIONS (NECESSITATED BY THE STAY ORDER) FOR DISPOSITION OF FIDUCIARY FUNDS FOR MEDICAL, LIFE AND DISABILITY BENEFITS; THEN WAIT TEN MONTHS AFTER ORAL ARGUMENT ON AN EXPEDITED APPEAL TO REVERSE THE DISTRICT COURT'S JUDGMENT IN AN (UNPUBLISHED) OPINION THAT DISREGARDS THE CLEARLY ERRONEOUS RULE AND THE EVIDENCE; THEN REMAND TO THE DISTRICT COURT WITH INSTRUCTIONS TO DISMISS THE SUIT EVEN THOUGH UNCONTROVERTED AND UNOPPOSED ALTERNATIVE RELIEF FOR FIDUCIARY INSTRUCTIONS HAS NOT BEEN ADDRESSED?

LIST OF PARTIES

Suit was prosecuted in the district court jointly by Jimmy F. Taylor, together with his successors, in his capacity as the Administrative Committee and for and on behalf of Petitioner, the Welfare Plan of the Mercantile Employees' Beneficiary Association (the "MEBA Welfare Plan") and Ameritrust, Texas, N.A., as Trustee of the Mercantile Employees' Beneficiary Association Trust (the "MEBA Trust"). Taylor resigned after judgment and appeal, and as his successor MCorp Management was appointed plan administrator by MCorp, the sponsor of the MEBA Welfare Plan. Therefore, in addition to being a Respondent to this petition for writ of certiorari, MCorp Management, in its capacity as plan administrator and as successor to the Administrative Committee of the MEBA Welfare Plan, acts for and on behalf of the MEBA Welfare Plan.

At the time of trial the defendants in the originalproceedings brought in the district court were Respondents, Bank One, Texas, N.A., formerly known as Deposit Insurance Bridge Bank, National Association, the Welfare Plan of the Deposit Insurance Bridge Bank Employees' Beneficiary Association, the Deposit Insurance Bridge Bank Employees' Beneficiary Association Trust, Banc One Mortgage Company, Texas, formerly known as MBank Mortgage Company, MCorp, MCorp Financial, and MCorp Management. All those entities are at least nominal parties to this appeal.

The MEBA Trust is not a corporation. However, pursuant to Supreme Court Rules 14.1(b) and 29.1, the Petitioners list Societe General, Inc. as the parent company of Ameritrust, Texas, N.A. Ameritrust, Texas, N.A. does not have any non-wholly owned subsidiaries.

Pursuant to Supreme Court Rules 14.1(b) and 29.1, the Petitioners list MCorp as the parent of MCorp Financial and list MCorp Financial as the parent of MCorp Management. MCorp, MCorp Financial and MCorp Management do not have any non-wholly owned subsidiaries.

Pursuant to Supreme Court Rules 14.1(b) and 29.1, the Petitioners list Banc One Corporation as the parent of Bank One, Texas, N.A. However, at the time of trial the Federal Deposit Insurance Corporation was the parent of Bank One, although Banc One Corporation held a small minority interest in Bank One. Petitioners do not know of any non-wholly owned subsidiaries of Bank One, Texas, N.A. and do not know of any non-wholly owned subsidiaries of the Federal Deposit Insurance Corporation. Petitioners list Bank One, Texas, N.A., as the parent corporation of Banc One Mortgage Company, Texas. Petitioners do not know of any non-wholly owned subsidiaries of Banc One Morgage Company, Texas.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

LIST OF PARTIES iii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES x

CASES x

STATUTES xiii

RULES xiv

MISCELLANEOUS xv

REPORTS OF OPINIONS DELIVERED BY OTHER COURTS 2

JURISDICTION 2

STATUTES AND RULES INVOLVED IN CASE 2

STATEMENT OF THE CASE 4

DISTRICT COURT JURISDICTION 11

ARGUMENT 11

I. THE COURT OF APPEALS DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT BECAUSE IT CONTAINS NUMEROUS FACT FINDINGS THAT VIOLATE THE CLEARLY ERRONEOUS RULE 12

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH RULE 8(a), (e)(2), F.R.CIV.P, ON A MATTER THATSHOULD BE SETTLED BY THIS COURT BECAUSE IT REVERSED AND ORDERED DISMISSAL INSTEAD OF REMANDING TO THE DISTRICT COURT TO CONSIDER THE PETITIONERS' UNOPPOSED ALTERNATIVE CLAIM FOR JUDICIAL INSTRUCTIONS IN EVENT OF DENIAL OF THE RELIEF SOUGHT AGAINST BANK ONE 22

III. THE COURT OF APPEALS' STAY ORDER IS CONTRARY TO 12 U.S.C. § 91 AND THE DECISIONS OF THIS COURT AND RAISES AN IMPORTANT MATTER OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT 24

IV. THE COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWERS OF SUPERVISION 27

CONCLUSION 28

APPENDICES

A Order of Court of Appeals (granting motion for stay of judgment pending appeal and expediting appeal), April 8, 1992 . . . . . .1a

B Order of Court of Appeals (denying motion to dissolve stay and granting motion to clarify stay), April 22, 1992 . . . . . .3a

C Order of Court of Appeals (denying motion for instructions), April 30, 1992 . . . . . .6a

D Letter of court of appeals returning suggestion for rehearing en banc unfiled, May 6, 1992 . . . . .7a

E Order of Court of Appeals (denying motion to supplement record with newly discovered evidence), October 1, 1992 . . . . . .9a

F Opinion of Court of Appeals, April 22, 1993 . . . . . .10a

G Order of Court of Appeals (denying petition for rehearing and suggestion for rehearing en banc), July 15, 1993 . . . . . .30a

H Order of Court of Appeals (granting motion to stay mandate), August 2, 1993 . . . . . .32a

I District court's Findings of Fact and Conclusions of Law, reported at *Taylor v. Bank One, N.A.*, 137 B.R. 624 (S.D.Tex.1992), January 15, 1992 . . . . . .34a

J Final Judgment, Declaratory Judgment, and Decree Instructing Trustee and Administrator, reported at *Taylor v. Bank One, N.A.*, 137 B.R. 624 (S.D. Tex.1992), January 15, 1992 . . . .67a

K District Court's Order granting in part and denying in part motion to alter or amend the judgment to permit termination of health benefits and denying alternative to stay the judgment, reported at *Taylor v. Bank One, N.A.*, 137 B.R. 624 (S.D.Tex.1992), February 18, 1992 . . . . . .71a

L Excerpts from Mercantile Employees' Beneficiary Trust Agreement, August 1, 1983 . . . . . .78a

M Excerpts from MCorp Cafeteria Plan, as amended effective July 1, 1984 . . . . . .91a

N Letter, and enclosed certified copy of corporate resolution adopted May 5, 1989, from Deposit Insurance Bridge Bank, N.A. to Benefits Committee of MCorp Pension Plan, board of directors of MCorp, and MTrust Corp, N.A. (now known as Ameritrust, Texas, N.A.), May 10, 1989 . .114a

O Excerpts from Bridge Bank Cafeteria Plan, May 5, 1989 . . . . . .125a

P Excerpts from Bridge Bank Employees' Beneficiary Association Trust Agreement, June 5, 1989 . . . . . .150a

Q Excerpts from Bank One Administrative Services Agreement No. 85276 between the Prudential Insurance Company of America and Deposit Insurance Bridge Bank, N.A., effect April 1, 1989 and signed February 10, 1990. . . . . .165a

TABLE OF AUTHORITIES

CASES

Anderson v. City of Bessemer City, N.C.,
470 U.S. 564 (1985) 13, 17

Baker v. Lukens Steel Co.,
793 F.2d 509 (3rd Cir.1986) 16

Bank of America Nat. Trust & Sav. Assoc. v.
Parnell, 352 U.S. 29 (1956) 24

Barr v. Matteo, 355 U.S. 171 (1957) 24

Black v. TIC Inv. Corp., 900 F.2d 112
(7th Cir. 1990) 22

Brandon v. InterFirst Corp., 858 F.2d 266
(5th Cir.1988) 22

Carpenters Amended and Restated Health
Benefit Fund v. Holleman Construction Co.,
751 F.2d 763 (5th Cir.1985) 13, 20

D.E.W., Inc. v. Local 93, Laborers
International Union, 957 F.2d 196 (5th Cir.1992) 18

Dean Milk Co. v. Madison, 340 U.S. 349 (1951) 24

Dockray v. Phelps Dodge Corp.,801 F.2d
1149 (9th Cir. 1986) 22

Earle v. Pennsylvania, 178 U.S. 449 (1900) 25

FDIC v. McClannahan, 795 F.2d 512 (5th Cir.1986) . . .12

Federal Deposit Ins. Corp. v. Connecticut Nat. Bank,
916 F.2d 997 (5th Cir.1990) 18

Fireman's Fund Insurance Co. v. Murchison,
937 F.2d 204 (5th Cir.1991) 18

Firestone Tire and Rubber Co. v. Bruch,
489 U.S. 113 (1989) 23

First National Bank of Selma v. Colby,
21 Wall. 609 (1874) 25

Godchaux v. Conveying Techniques, Inc.,
846 F.2d 306 (5th Cir.1988) 18

Herbert v. Exxon Corp., 953 F.2d 936
(5th Cir. 1991) 25

Howell v. Continental Credit Corp.,
655 F.2d 743 (7th Cir.1981) 12

Hozier v. Midwest Fasteners, Inc.,
908 F.2d 1155 (3rd Cir.1990) 16

Jhaver v. Zapata Off-Shore Co.,
903 F.2d 381 (5th Cir.1990) 18

Lockrey v. Leavitt Tube Employees'
Profit Sharing Plan, 748 F. Supp. 662
(N.D. Ill. 1990) 22

MCorp v. Clark, 755 F. Supp. 1402 (N.D.Tex.1991) 5

Mosser v. Darrow, 341 U.S. 267 (1951) 23

NLRB v. Pine Valley Division of Ethan Allen, Inc., 544 F.2d 742 (4th Cir.1976) 13

Philadelphia Police and Fire Assoc. for Handicapped Children, Inc. v. City of Philadelphia, 705 F. Supp. 1109 (E.D.Pa. 1989) 13

Policy v. Powell Pressed Steel Co., 770 F.2d 609 (6th Cir.1985), *cert. denied*, 475 U.S. 1017 (1986) 13

Pullman-Standard v. Swint, 456 U.S. 273 (1982) . . . 13, 17

REO Industries, Inc. v. Natural Gas Pipeline Co. of America, 932 F.2d 447 (5th Cir.1991) 18

Robbins v. Pepsi-Cola Metropolitan Bottling Co., 800 F.2d 641 (7th Cir.1986) 26

State Bank & Trust Co. v. D.J. Griffin Boat, 926 F.2d 449 (5th Cir. 1991) 25

Swanson v. Traer, 354 U.S. 114 (1957) 24

Taylor v. Bank One, N.A., 137 B.R. 624 (S.D.Tex.1992) 1, 2, 9, 28

Third National Bank in Nashville v. Impac Limited, Inc., 432 U.S. 312 (1976) 25

U.S. Postal Service v. American Postal Workers Union, AFL-CIO, 922 F.2d 256 (5th Cir.1991) 19

United States v. FDIC, 881 F.2d 207 (5th Cir. 1989) 25

United States v. LeMaire, 826 F.2d 387 (5th Cir. 1987), *cert. denied*, 485 U.S.960 (1988) 25

United States v. United States Gypsum Co., 333 U.S. 364 (1948) 13

United Steelworkers of America v. Connors Steel Co., 855 F.2d 1499 (11th Cir.1989), *cert. denied*, 489 U.S. 1096 (1989) 13

Upholsterers' Int'l Union Pension Fund v. Artistic Furniture, 920 F.2d 1323 (7th Cir.1990) 13

STATUTES

12 U.S.C. § 91 . . . . . 3, 9, 24, 25, 27

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1331 11

28 U.S.C. § 2106 . . . . . 3, 24

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, *as amended*, 29 U.S.C. §§ 1001, *et seq.* ("ERISA"):

ERISA § 3(1), 29 U.S.C. § 1002(3)(1) 4

ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) . . .7,8

ERISA § 101, 29 U.S.C. § 1021(21)(A) 7, 16

ERISA § 104, 29 U.S.C. § 1024 . . . . . 16, 24

ERISA § 403(c)(1), 29 U.S.C. § 1103 (c)(1) . 7, 21

ERISA § 403(d)(2), 29 U.S.C. § 1103 (d)(2) . .6, 7

ERISA § 404, 29 U.S.C. § 1104 13

ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) 7

ERISA § 405(a)(1),(2),(3),
29 U.S.C. § 1105(a)(1),(2),(3) 7, 8

ERISA § 406(b)(1),(2),
29 U.S.C. §1106(b)(1),(2) 7

ERISA § 502(d)(1),(2),
29 U.S.C. § 1132(d)(1),(2) 25

ERISA § 502(e)(1),
29 U.S.C. § 1132(e)(1) 11

INTERNAL REVENUE CODE § 501(c)(9),
29 U.S.C. § 501(c)(9) 4

RULES

Rule 20.1, SUPREME COURT RULES 26

Rule 8(a), F.R.CIV.P 3, 22, 24

Rule 8(e)(2), F.R.CIV.P 3, 22, 24

Rule 52(a), F.R.CIV.P 2, 3, 17

Rule 62(d), F.R.CIV.P 25

MISCELLANEOUS

G. BOGERT & G. BOGERT, LAW OF TRUSTS AND TRUSTEES § 559 at 162-168 (2d Rev. Ed.1980) 25

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE MERCANTILE EMPLOYEE'S BENEFICIARY ASSOCIATION TRUST and the WELFARE PLAN of the MERCANTILE EMPLOYEES' Beneficiary Association,

Petitioners,

v.

BANK ONE, TEXAS, N.A., formerly known as DEPOSIT INSURANCE BRIDGE BANK, NATIONAL ASSOCIATION, the WELFARE PLAN of the DEPOSIT INSURANCE BRIDGE BANK EMPLOYEES' BENEFICIARY ASSOCIATION, the DEPOSIT INSURANCE BRIDGE BANK BENEFICIARY ASSOCIATION TRUST, BANC ONE MORTGAGE COMPANY, TEXAS, formerly known as MBANK MORTGAGE COMPANY, MCORP, MCORP FINANCIAL, and MCORP MANAGEMENT,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioners seek a writ of certiorari to review the orders, opinion and judgment in Appeal No. 92-7160, *Jimmy F. Taylor, et al. v. Bank One Texas, N.A., et al.*, in the United States Court of Appeals for the Fifth Circuit.

REPORTS OF OPINIONS DELIVERED BY OTHER COURTS

The orders, opinion and judgment of the United States Court of Appeals for the Fifth Circuit are annexed in the Appendices[1] as App A through H. None were reported. The district court's findings of fact and conclusions of law, final judgment, declaratory judgment, and decree instructing trustee and administrator, and order granting in part and denying in part the motion to alter or amend the judgment to permit termination of health benefits and denying the alternative motion to stay the judgment are annexed in App I through K. They are all reported at *Taylor v. Bank One, N.A.*, 137 B.R. 624 (S.D.Tex.1992).

JURISDICTION

The judgment of the court of appeals was entered on April 22, 1993 (App F). A timely petition for rehearing and suggestion for rehearing en banc were denied on July 15, 1993 (App G). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED IN CASE

Rule 52(a), F.R.Civ.P., provides in pertinent part:

> Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

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[1] References to the appendices are shown as "App __", except that reference to particular district court findings (App I) are shown as "FF __".

Rule 8(a), F.R.Civ.P., provides in pertinent part:

Relief in the alternative or of several different types may be demanded.

Rule 8(e)(2), F.R.Civ.P., provides in pertinent part:

A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses.

28 U.S.C. § 2106 provides:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

12 U.S.C. § 91 provides:

Transfers by bank and other acts in contemplation of insolvency

All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either,

made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any State, county, or municipal court.

STATEMENT OF THE CASE

Petitioners are the Mercantile Employees' Beneficiary Association Trust (the "MEBA Trust") and the Welfare Plan of the Mercantile Employees' Beneficiary Association (the "MEBA Welfare Plan"). Respondents are Bank One, Texas, N.A., formerly known as Deposit Insurance Bridge Bank, N.A. ("Bank One"), the Welfare Plan of Bank One, Texas, Employees' Beneficiary Association (the "Bank One Plan"), the Deposit Insurance Bridge Bank Employees' Beneficiary Trust (the "Bank One Trust"), and Banc One Mortgage Company, Texas, formerly known as MBank Mortgage Company. Bank One is the sponsor of the Bank One Plan. Additional Respondents are MCorp, MCorp Management, and MCorp Financial.

The MEBA Trust is the funding medium for the MEBA Welfare Plan, a welfare benefits plan under section 3(1) of the Employee Income Retirement Security Act of 1974, *as amended*, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), and a voluntary employees' beneficiary association under INTERNAL REVENUE CODE § 501(c)(9), 29 U.S.C. § 501(c)-(9). The MEBA Welfare Plan documents provide for medical, life and disability benefits for eligible participating employees, and their beneficiaries, of banks and other

companies affiliated with plan sponsor MCorp. (FF 25, 36, 66; App L, M, Q) The current plan administrator is MCorp Management, the successor to Jimmy F. Taylor, who at the time of trial was the plan administrator and sole member of the administrative committee for the MEBA Welfare Plan.

Some twenty-five "MBanks" and a number of other companies were affiliated with MCorp. On March 28, 1989 the Federal Deposit Insurance Corporation ("FDIC") was appointed receiver for twenty of the "MBanks" that were declared insolvent[2] by the Office of the Comptroller of Currency (the "Failed Banks"). The FDIC transferred assets of the Failed Banks to Bank One (then known as Deposit Insurance Bridge Bank, National Association), and the active employees of the Failed Banks immediately went to work for Bank One. Those active employees, as well as approximately 900 former employees of the Failed Banks who retired or became disabled before March 28, 1989 (the "Subject Participants"), were covered by life, medical and disability benefits provided through the MEBA Welfare Plan. (The active employees are referred to in this Petition together with the Subject Participants as the "Failed Bank participants".) There were a number of *other* persons who were also participants of the MEBA Welfare Plan but who were employed by participating employers affiliated with MCorp that are not Failed Banks (the "non-Failed Bank participants").

Bank One put MEBA Welfare Plan administrator Jimmy F. Taylor into a serious dilemma. The MEBA Welfare Plan documents require that, in event of dissolution or liquidation of some but not all of the participating employers, the trust funds for participants of participating employers

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[2] The insolvency proceedings are detailed in *MCorp v. Clark*, 755 F. Supp. 1402 (N.D.Tex.1991).

that are not liquidated or dissolved (funds held for the non-Failed Bank participants) shall remain in trust. Trust funds for participants whose employers have been dissolved or liquidated (funds held for the Failed Bank participants) are (1) paid out in the form of distributions to the Failed Bank participants "in the event that a successor to the Employer by operation of law or the acquisition of its business interests shall not elect to continue the Plan and this trust", but (2) if "a corporation succeeding to the interest of an Employer by . . . bankruptcy . . . elect[s] to continue this trust agreement or . . . otherwise assum[es] the duties and responsibilities of the Plan and trust", the funds are kept in trust either (a) in the MEBA Trust, or (b) in a successor trust if "such corporation . . . establish[es] a separate plan and trust for continuation of benefits for its employees". (FF 74; *see* FF 40, 43; App L § 11) Accordingly, had there been no election by a successor employer, under section 11.01 of the trust document and as required by law, ERISA § 403(d)(2), 29 U.S.C. § 103(d)(2), Taylor would have directed the MEBA Trust to distribute all trust funds allocable to the Failed Bank participants and the MEBA Trust would have kept the funds allocable to the non-Failed Bank participants. (FF 75)

In a May 10, 1989 letter signed by its president (App N), in its May 5, 1989 resolutions of its board of directors (*Id.*), and in other documents and conduct, Bank One informed the MEBA Welfare Plan that since March 28, 1989 Bank One was a participating employer in the MEBA Welfare Plan as successor to the Failed Banks (FF 38, 40, 42); gave the required 30 days notice of withdrawal from the MEBA Welfare Plan (so that withdrawal would be effective on June 9, 1989)(FF 44); established the Bank One Plan as a successor welfare plan (whose text expressly recites that from March 28, 1989 until its withdrawal Bank One was a participating employer in the MEBA Welfare Plan) (FF 48) (App O); demanded payment to the Bank One Trust of all

remaining MEBA Welfare Plan funds (FF 50-56); and represented that it was continuing all benefits under the MEBA Welfare Plan (FF 38, 40, 42-44). On June 5, 1989 Bank One established the Bank One Trust, whose trust indenture states that, from March 28, 1989 until the effective date of its withdrawal, Bank One was a participating employer in the MEBA Welfare Plan and that the Bank One Trust is a successor to the MEBA Welfare Plan. (FF 44; App P) These claims, notices, demands and representations were not made by persons unfamiliar with the MEBA Plan and Trust but by Bank One officers and employees who implemented the successor Bank One Plan and Bank One Trust, had been employed by the Failed Banks until March 28, 1989, and were familiar with the terms of the MEBA Welfare Plan and MEBA Trust. (FF 64)

For these reasons, under section 11.02 of the MEBA Trust agreement Taylor could not distribute the trust funds allocable to the Failed Bank participants. (FF 74-75) Yet on the other horn of the dilemma, although the MEBA Welfare Plan does not provide for the taking of trust funds without related liabilities to its plan participants (FF 76), Taylor reasonably believed that Bank One intended to take all of the trust funds without providing benefits for the retired and disabled Subject Participants. (FF 75) In fact, Bank One sought in its name to recover the MEBA Trust funds for the benefit of the FDIC, which was the owner of Bank One. (FF 59; *see*, FF 52, 56, 58, 60-61). That conduct by Bank One as an ERISA fiduciary was unlawful. ERISA §§ 3(21)(A), 403(c)(1), 404(a)(1), 406(b)(1),(2), 29 U.S.C. §§ 1002(21)-(A), 1103(c)(1), 1104(a)(1), 1106(b)(1),(2). Under those circumstances, had Taylor complied with Bank One's repeated demands to pay the funds to the Bank One Trust, he would have been subject to co-fiduciary liability. ERISA §§ 3(21)(A), 405(a)(1),(2),(3), 29 U.S.C. §§ 1002(21)(A), 1105(a) (1),(2),(3). Bank One's conduct thus created

Taylor's dilemma: whether to pay the allocable MEBA Trust funds directly to the Failed Bank participants or to pay the trust funds to the successor Bank One Trust. (FF 75) Either alternative risked fiduciary liability.

Relying on Bank One's representations that it had become a participating employer in the MEBA Welfare Plan and later withdrew and established a successor plan and trust, Taylor allocated the funds held by the MEBA Trust as between the non-Failed Bank participants (whose employers did not withdraw from the plan) and the Failed Bank participants (whose successor employer did withdraw from the plan.) (FF 80) Because Bank One provided benefits to the Failed Bank participants who had become "active employees" of Bank One but not for the Failed Bank participants who retired or became disabled before March 28, 1989 (the Subject Participants), Taylor continued benefits to the Subject Participants out of funds allocable to the Failed Bank participants. (FF 77)

The Petitioners filed suit in the district court seeking among other things a declaratory judgment that Bank One and its successor plan and trust are liable to administer and provide welfare benefits for the Subject Participants. They also sought instructions approving the plan administrator's allocation of trust funds, and in the event their primary relief were denied sought instructions on whether trust funds allocable to the non-Failed Bank Participants are payable to the Subject Participants.[3]

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[3] Bank One never made employer contributions for the Subject Participants, and as of November 1991 the trust funds allocable to the Failed Bank participants were nearing exhaustion through payment of benefits. (FF 77, 78, 79 and 80) By December 31, 1991 all such funds were exhausted.

The case was tried in the district court in November 1991. On January 15, 1992 the district court made findings of fact and stated conclusions of law (App I) and entered a declaratory judgment and decree of fiduciary instructions (App J) among other things determining that, effective March 28, 1989, Bank One became a participating employer under the MEBA Welfare Plan and as such became and remains liable to administer and provide welfare benefits for the Subject Participants.

The district court denied Bank One's motion to alter or amend the judgment to permit termination of health benefits and in the alternative to stay the judgment. (App K); *Taylor v. Bank One, Texas, N.A.*, 137 B.R. 624 (S.D.Tex.1992). Bank One, the Bank One Plan, and the Bank One Trust began to comply with the terms of the judgment. But on Bank One's motion the court of appeals, relying on 12 U.S.C. § 91, stayed the judgment of the district court and expedited the appeal.

The stay order freed Bank One from the obligation to provide benefits to the Subject Participants during the appeal, but the district court's findings and judgment (App I, J) neither required nor permitted the MEBA Welfare Plan and the MEBA Trust to provide benefits for the Subject Participants. Some of the Subject Participants are in precarious health and depend upon their disability income for their basic necessities, so the Petitioners immediately moved to dissolve the stay and in the alternative to clarify that a 12 U.S.C. § 91 stay does not shield judgment defendants that are not banks. On April 22, 1992 the court of appeals denied the Petitioners' motion and clarified the stay to shield the non-bank judgment defendants because their liability is "inextricably intertwined" with that of the bank defendant. (App B) Because funds allocable to the Failed Bank participants had been exhausted by payment of benefits, the

Petitioners then moved the court of appeals to instruct the MEBA Trust whether or not to use funds allocable to the non-Failed Bank Participants to continue benefits for the Subject Participants. The court of appeals denied the motion on April 30, 1992 without giving any instructions to the Petitioners. (App C) The Petitioners sought review of the stay order by filing a suggestion that the stay order be reheard en banc. The Petitioners' suggestion was returned unfiled (App D).

Oral argument was made to the panel on June 30, 1992. In September 1992 the Petitioners discovered that Bank One had withheld from production during pre-trial discovery a letter agreement between Bank One and the FDIC that listed a number of compensation and benefit plans, programs, contracts and agreements, entered into by one or more of the Failed Banks for its employees, that Bank One and the FDIC had agreed Bank One did *not* assume. Because the letter did not list the MEBA Welfare Plan, which is a benefit plan that Petitioners contend Bank One *did* assume, Petitioners moved to supplement the record with the letter and requested that the court of appeals draw all inferences permissible from the letter against Bank One. The court of appeals denied the motion. (App E)

On April 22, 1993 the court of appeals reversed the judgment of the district court and ordered the case dismissed. (App F) The Petitioners filed a timely petition for rehearing. Petitioners asked the court to reconsider its reversal of the district court and also asked the court not to order complete dismissal of the case but to remand to the district court for further proceedings not inconsistent with its opinion. Among other things the Petitioners pointed out the alternative relief requested by Petitioners in the district court in case the primary relief were denied -- for instructions approving the allocation of funds and determining whether funds allocable

to the non-Failed Bank Participants are available to pay benefits for the Subject Participants. Petitioners also suggested the case be reheard en banc. Although Bank One did not oppose Petitioners' request for remand to the district court for instructions rather than reversal outright with an order to dismiss, the court of appeals declined to modify its order, denied the Petitioners a rehearing and denied the Petitioners' suggestion for rehearing en banc. (App G)

DISTRICT COURT JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 and ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

ARGUMENT

The decision below should be reviewed because the court of appeals made unwarranted fact findings to deny medical, life and disability benefits to retired and disabled former employees of banks whose welfare benefits plan was assumed by Bank One. The decision thwarts the allocation of fact finding power between the district and circuit courts, leaves unremedied aggravated conduct by Bank One and the FDIC that damaged a welfare benefits plan and trust seeking to discharge their fiduciary responsibilities properly, and leaves 900 people, who worked many years to acquire their welfare benefits, to face the future without health care or disability payments.

The MEBA Welfare Plan required its participating employers to provide coverage for the Subject Participants. (FF 16-20, 66, 76) Bank One became a participating employer in the MEBA Welfare Plan effective March 28, 1989. (FF 71-72; *see*, FF 30-42, 44, 62) Bank One remained a participating employer in the MEBA Welfare Plan until June 9, 1989. (FF 45) Bank One withdrew from the

MEBA Welfare Plan and MEBA Trust and established a successor welfare plan and successor trust. (FF 42-44, 48) Bank One's plan provided the same benefits as the MEBA Welfare Plan. (FF 25, 40, 65) Bank One did not effectively exclude the Subject Participants from coverage under its plan. (FF 23, 68-70, 73) The court of appeals should have affirmed the district court's declaration of Bank One's liability to provide welfare benefits for the Subject Participants.[4]

I. THE COURT OF APPEALS DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT BECAUSE IT CONTAINS NUMEROUS FACT FINDINGS THAT VIOLATE THE CLEARLY ERRONEOUS RULE.

The court of appeals' opinion is replete with appellate fact findings that contradict the district court's findings in abrogation of the respective roles of the district and appellate courts. Bank One chose to become a participating employer in the MEBA Welfare Plan in order to take MEBA

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[4] The MEBA Welfare Plan and the MEBA Trust contain bilateral obligations binding on a "bridge bank" such as Bank One. *Howell v. Continental Credit Corp.*, 655 F.2d 743 (7th Cir.1981); *FDIC v. McClannahan*, 795 F.2d 512, 515 (5th Cir.1986). A successor corporation is bound by a welfare benefits plan that it assumes or adopts. *NLRB v. Pine Valley Division of Ethan Allen, Inc.*, 544 F.2d 742 (4th Cir.1976). A successor employer may be held responsible for the same welfare benefits as its predecessor. *United Steelworkers of America v. Connors Steel Co.*, 855 F.2d 1499 (11th Cir.1989), *cert. denied*, 489 U.S. 1096 (1989). Principles of successorship liability apply in ERISA cases. *Upholsterers' Int'l Union Pension Fund v. Artistic Furniture*, 920 F.2d 1323, 1327 (7th Cir.1990). An employer which has adopted a welfare benefits plan may not breach its terms or interpret them in an arbitrary or capricious manner. *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir.1985), *cert. denied* 475 U.S. 1017 (1986); ERISA § 404, 29 U.S.C. § 1104.

Trust funds for the benefit of the FDIC, to enable a purchaser for the bank to avoid dealing with MCorp, and in conjunction with adopting MCorp's pension plan to recover any excess in the plan funds. (FF 59; *see* FF 39, 52, 56, 58, 60-61) By electing to continue the plan under section 11.01 of the MEBA Trust, Bank One prevented distribution of trust funds to the Failed Bank participants, including Bank One's own active employees. (FF 75) The courts should not permit a bank to escape liability under those circumstances, even if the conduct giving rise to the liability is conceived, directed and indemnified by the FDIC.

The district court's findings are not "clearly erroneous". Rule 52(a), F.R.Civ.P. Findings of fact are "clearly erroneous" only if a review of the entire record impels the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948). The clearly erroneous rule applies even when the district court's findings do not rest on credibility determinations but are based on physical or documentary evidence or inferences drawn from them. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982); Rule 52(a), F.R.Civ.P. Even the court below recognizes that findings based on a party's intent are protected by the clearly erroneous rule. (App F at 5-6); *Carpenters Amended and Restated Health Benefit Fund v. Holleman Construction Co.*, 751 F.2d 763 (5th Cir.1985) (rule governs finding on whether parties' conduct bound them by contract).

Here the court of appeals ignored the evidence to make its own appellate fact findings. For example, with the casuistry that Bank One's withdrawal from the MEBA Welfare Plan is not an "unequivocal admission" that it was ever in the plan (App F at 20a), the court of appeals disregarded the district court's finding that Bank One became

a participating employer in the MEBA Welfare Plan. (FF 30, 44) The court of appeals thus chose to ignore the written statements in Bank One's own plan and trust documents that Bank One "has continued as a participating employer in the [MEBA Welfare Plan] since its inception on March 28, 1989 as successor to" the Failed Banks. (FF 42, 44; App O § 1.1 at 130a; App P at 151a) Similarly, the court of appeals makes the sweeping appellate fact finding that "the overwhelming and uncontradicted evidence at trial shows that Bank One, through its benefits administrator, intended to set up a plan new and distinct from the MEBA Welfare Plan. . ." (App F at 23a) The written statements in Bank One's plan documents, together with its board resolutions (FF 39-41, 62; App N at 117a), correspondence (FF 11, 14, 43-44; App N at 114a), and its other conduct (e.g., FF 30-37, 50-57), are at least substantial evidence supporting the district court's findings that Bank One operated as a participating employer under the MEBA Welfare Plan until its withdrawal from the plan on June 9, 1989.

The court of appeals also made findings on intent of the parties that were not supported by the evidence. There is *no evidence* to support the court of appeals' appellate fact finding that "Bridge Bank carried out its intent to set up a new employee welfare plan for its 7,000 employees through the purchase and maintenance of new group insurance policy and through distinct administration of benefits commencing March 29, 1989." (App F at 23a) The group insurance policy was signed and dated in February 1990[5], in the second month *after* the Bank One terminated its own plan (App Q), and for that reason cannot show Bank One's intent

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[5] The court of appeals' opinion finds the policy was obtained upon Bank One's "opening for business" on March 29, 1989. (App F at 3, 15) But as App Q, page 175a, makes clear, it was not until February 10, 1990 that Candy Clark Aldridge signed the policy for Bank One.

between March 29, 1989 and the June 9, 1989 effective date of its withdrawal from the MEBA Welfare Plan. (App Q) There was nothing "distinct" about the administration of the Bank One Plan and the MEBA Welfare Plan. Between March 28 and June 9, 1989 Bank One operated under the MEBA Welfare Plan according to the express terms of its own documents. (FF 42, 44) And from March 28, 1989 until December 1990 Bank One administered both the MEBA Welfare Plan and its own Bank One Plan. (FF 57) In practice, that meant that *Bank One*'s plan administrator provided health benefits for the Subject Participants out of funds allocated to them (FF 78, 80), that the Subject Participants paid their plan contributions to the *Bank One* plan administrator (FF 37, 54, 56), and that Bank One kept their money in an account in *Bank One* (FF 52). The summary plan description used for the MEBA Welfare Plan provides for coverage of the Subject Participants, and Bank One continued to use the MEBA Welfare Plan summary plan description for the Bank One Plan. (FF 25, 36 and 66) When Bank One withdrew from the MEBA Welfare Plan its plan participants must have included the Subject Participants because the Bank One Plan documents made no changes as to benefit obligations. (FF 24 and 65) At trial, Bank One's own plan administrator testified she intended the Bank One Plan to be a "continuation" of the MEBA Welfare Plan. (FF 26)

The court of appeals found that the Bank One plan did not expressly cover but excluded the retirees of the Failed Banks. (App F at 29a and n.13) But under the terms of the MEBA Welfare Plan -- the only plan under which the Bank One could have operated until its June 9, 1989 withdrawal -- retired and disabled former employees of the Failed Banks are participants covered by the plan documents, as shown by the Summary Plan Description. (FF 16-20, 36, 65-66, 68-69, 76) And in the district court the parties *stipulated*

that plan "participants" include active employees, retired employees, disabled employees and their beneficiaries. (FF 19) To exclude the Subject Participants from coverage, Bank One is required by ERISA to make a written amendment to the plan and to give notice to the Subject Participants. *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1163 (3rd Cir.1990); *Baker v. Lukens Steel Co.*, 793 F.2d 509 (3rd Cir.1986); ERISA §§ 101, 104, 29 U.S.C. §§ 1021, 1024. No amendments were made to its plan, and Bank One never gave the required notice. (FF 42, 66) At trial the Bank One Plan administrator disclaimed any intent (and under the plan documents had no authority) to exclude the Subject Participants from coverage. (FF 26, 67-68) There is no mention of excluding coverage for the Subject Participants in the minutes of the Bank One benefits committee, which under the plan documents had authority to determine inclusions or exclusions to coverage. (FF 67-69) The chairman of that committee had no relevant knowledge or meaningful input in the matter (FF 28) and at trial testified he did not recall the subject of coverage for the Subject Participants ever being raised while he was on the committee. Although Bank One's corporate minutes state the FDIC was controlling all decisions on these matters (FF 28), the FDIC's designated corporate representative had no knowledge of any such exclusions.

By claiming the power of de novo review in a case of "contract construction", the court of appeals ignored the district court's fact findings that Bank One had become a participating employer in the MEBA Welfare Plan and assumed duties and responsibilities to the Subject Participants. (FF 71-76, 19-21, 30-38, 40, 42, 44-45) To do this, the court of appeals interpreted the plan documents so that Bank One *could not* "adopt" the trust without MCorp's approval (App F at 19a) and MCorp *could not* approve Bank One's adoption because it was not affiliated with MCorp

(App F at 18a). The court omitted to analyze all the pertinent language, overlooking the language that a successor employer "may elect to continue this trust by *adopting* this trust agreement *or by otherwise assuming the duties and responsibilities of the Plan and trust* in accordance with the provisions of Section 10.02" of the trust. (App L § 11.02 at 86a)

First, as this Court's decisions and Rule 52(a) establish, the clearly erroneous rule protects not only findings based on testimony but also findings based on documentary evidence. *Anderson v. City of Bessemer City, N.C., supra*; *Pullman-Standard v. Swint, supra*; Rule 52(a), F.R.CIV.P. This case cannot be decided merely by reference to the plan documents. Despite the court of appeals' recognition that de novo review is limited to interpretations within the "four corners of the contract" (App F at 14a), like the district court it considered not only the plan documents, but also the communications between Bank One and MCorp, the board resolutions of both Bank One and MCorp, many other documents, and the conduct and intent of Bank One, MCorp, the MEBA Trust, and the FDIC.

Second, the court's interpretation of section 11 of the trust renders meaningless its provisions for continuation of the trust by a successor by operation of law or bankruptcy. The court's construction confuses the trust's provisions for *affiliated employers* which adopt the plan with its provisions for *successors to the interests of affiliated employers*. Under section 1.06 of the trust the term "employer" is defined to include *successors* and thus is necessarily broader than "affiliates" of MCorp. (App L § 106 at 80a) Section 11 of the MEBA Trust agreement expressly permits successors to an employer "by operation of law or by acquisition of its business interests" or by "bankruptcy" to become participating employers. A receiver succeeding by operation

of law or a trustee succeeding by bankruptcy cannot be affiliated with the owner of the corporation in receivership or bankruptcy or be required to seek the owner's approval to take action.

The court of appeals recognizes this interpretation of section 11 "as a possible reading of the provision", but one that is less likely than its own. (App F at 24a n.6) But the court's recognition of this "possible reading" at the least shows an ambiguity in the plan documents, for a contract is ambiguous if it is reasonably subject to more than one meaning. *Fireman's Fund Insurance Co. v. Murchison*, 937 F.2d 204, 207 (5th Cir.1991). The clearly erroneous rule protects a district court's interpretation of an ambiguous contract. *Jhaver v. Zapata Off-Shore Co.*, 903 F.2d 381, 384 (5th Cir.1990); *Godchaux v. Conveying Techniques, Inc.*, 846 F.2d 306, 314-15 (5th Cir.1988). In any case, the court of appeals' interpretation ignores the well recognized rule that contracts are to be construed in their entirety to give effect to the intent of the parties, considering each provision with reference to the entire contract, giving every clause some effect and harmonizing inconsistent clauses so that no clause will be rendered meaningless. *E.g., D.E.W., Inc. v. Local 93, Laborers International Union*, 957 F.2d 196, 200 (5th Cir.1992); *Fireman's Fund Ins. Co. v. Murchison, supra*; *REO Industries, Inc. v. Natural Gas Pipeline Co. of America*, 932 F.2d 447, 453 (5th Cir.1991); *Federal Deposit Ins. Corp. v. Connecticut Nat. Bank*, 916 F.2d 997, 1001 (5th Cir.1990).

Additionally, the court of appeals erroneously applied the eligibility requirements of section 10.2 of a related but separate document, the MCorp *Cafeteria Plan*. (App M) Section 10.2 of the MCorp Cafeteria Plan requires approval by MCorp for an employer to adopt the plan, but section 11 of the trust does not require "eligibility" under the plan and

only requires adoption of the trust or assumption of the duties and responsibilities of the plan and trust under section 10.02 of the *trust*.[6] Instead of harmonizing the provisions of the trust and cafeteria plan, the court of appeals grafted the eligibility requirements of section 10.2 of the *Cafeteria Plan* onto the adoption procedure provided by section 10.02 of the *trust*, then interpreted the adoption procedure of section 10.02 of the trust to override the specific "successor by operation of law" and "successor by bankruptcy" provisions of section 11.02 of the trust. When specific clauses conflict with the general provisions of an agreement, well established principles of construction require that the specific "trump" the general. *E.g., U.S. Postal Service v. American Postal Workers Union, AFL-CIO*, 922 F.2d 256, 260 (5th Cir.1991). The court of appeals' interpretation of the documents led to a result that could not have been intended by the plan documents, that with or without MCorp's approval an unaffiliated successor to a participating employer cannot adopt the trust or assume the duties and responsibilities of the plan.

The court of appeals also parsed the text of Bank One's board resolutions and correspondence and noted that Bank One did not use the specific word "adopt" when it declared its right as a successor to withdraw from the MEBA Welfare Plan and Trust. (App F at 17a, 18a, 20a) The court of appeals held that Bank One's description of its plan as a "successor" to the MEBA Plan [did not] talismanically transform the later plan into a part of its predecessor" (App

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[6] Section 10.02 of the *trust* states the formalities required to evidence the successor's agreement to the terms of the MEBA Welfare Plan. The only formality specified by 10.02 of the trust is a "written instrument, duly executed by [the] president or chief personnel officer, acknowledged and delivered to the Trustee and the Committee." Bank One's May 10, 1989 letter complies precisely. (App N)

F at 23a) and that the district court erred by holding corporate successorship conferred liability as a matter of law (App F at 28a). The court misread the district court's findings. The question is not whether Bank One's claim to be a *successor* was sufficient to "adopt" the trust but whether its affirmative claim to be a participating employer in the MEBA Welfare Plan, stated in its own successor plan and its own successor trust, referenced in a letter signed by its president, supported by resolutions of its board of directors, and bolstered by its conduct and other representations, constitutes an assumption of "the duties and responsibilities of the plan". The district court found it did (FF 71-73), and its findings on whether Bank One's conduct bound Bank One to the plan documents are protected by the clearly erroneous rule. *Carpenters Amended and Restated Health Benefit Fund v. Holleman Construction Co.*, 751 F.2d 763 (5th Cir.1985).

The court of appeals also interpreted the trust document so that a successor employer could establish a successor trust and demand transfer of trust funds without assuming the duties and responsibilities of the plan.[7] That

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[7] The court read section 11 of the trust to provide three options in event of change of control of a participating employer: (1) distribution of the trust funds to the participants, (2) continuation of the trust by a successor's adoption of the trust, and (3) transfer of the trust funds to a successor trust established by the successor employer. (App F at 15a-16a) The court's interpretation is wrong. Under Section 11.01 distribution of trust funds is mandatory unless a successor elects to continue the trust. Section 11.02 is an alternative to mandatory termination of the trust fund that applies in the event that a successor by operation of law elects to adopt the trust or otherwise assume and continue the plan and trust in either its present form or in the form of a successor. Accordingly, the heading to section 11.01 of the MBA Trust identifies the contents of section 11.01 as dealing with "*Termination of Trust Fund*", and the heading of section 11.02 identifies the contents of section 11.02 as dealing with "*Continuation by Employer's Successor*".

interpretation is irrelevant because Bank One did not merely establish the successor trust and seek the trust funds. Bank One also expressly claimed to be a participating employer in the MEBA Welfare Plan.

In addition to ignoring the district court's findings of fact based on Bank One's oft-repeated claim to be a participating employer in the MEBA Welfare Plan, the court of appeals made a similar appellate fact finding on the purchase and assumption agreements. The district court found that Bank One believed that Bank One had the right to participate in the MEBA Welfare Plan based on the purchase and assumption agreements and its reading of the MEBA benefits plan documents. (FF 62-63) As with its omission to analyze part of the trust language relied upon by the district court, the court of appeals omits to discuss section 2.1(j) of the purchase and assumption agreements relied upon by the district court. (App F at 24a-26a) Section 2.1(j) provides for the assuming bank to assume the liabilities, duties and obligations pursuant to section 4.7, which in turn provides for an assuming bank to succeed to the obligations and agreements of the Failed Banks held under fiduciary or representative capacities to the same extent as though the assuming bank had originally assumed the same. The assets of a welfare benefits plan may only be held in a fiduciary or representative capacity. ERISA § 403(c)(1), 29 U.S.C. § 1103(c)(1). There is no dispute on this point, and when it filed its proof of claim in the MCorp bankruptcy, Bank One was careful to note its claim related to amounts held in trust under the MEBA Welfare Plan. (FF 51) The district court was correct in holding that the purchase and assumption agreements provided a separate and distinct basis for Bank One's liability. (FF 63)

The district court found that Bank One is estopped to deny that it became a participating employer in the MEBA Welfare Plan as a successor to the Failed Banks. (FF 73; *see* FF 59, 75) The court of appeals did not even address the district court's estoppel findings, which the court held were mooted by its holding that Bank One did not adopt the plan and trust. (App F at 28a-29a) The elements of equitable estoppel are present whether or not the plan documents permit an unaffiliated successor to assume the duties and responsibilities of the plan.[8] Principles of equitable estoppel apply to claims under ERISA. *Black v. TIC Inv. Corp.*, 900 F.2d 112, 114 (7th Cir. 1990); *Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149, 1155 (9th Cir. 1986); *Lockrey v. Leavitt Tube Employees' Profit Sharing Plan*, 748 F. Supp. 662, 664 (N.D. Ill. 1990). Also, the principles of judicial estoppel bar Bank One from denying its participation in the MEBA Welfare Plan in order to prevent Bank One from "playing fast and loose with the courts to suit the exigencies of self interest." *Brandon v. InterFirst Corp.*, 858 F.2d 266, 268 (5th Cir.1988). Bank One filed a proof of claim in the MCorp bankruptcy as successor to the interests of the Failed Banks in the MEBA Welfare Plan, claimed its benefits plan was a successor to the MEBA Welfare Plan, and sought recovery of the funds held in the MEBA Trust. (FF 51)

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH RULE 8(a), (e)(2), F.R.CIV.P, ON A MATTER THAT SHOULD BE SETTLED

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[8] Plan administrator Jimmy Taylor relied on Bank One's repeated representations of its status as a participating employer. (FF 75) As a result of Bank One's claims, Taylor was prohibited from distributing assets from the MEBA Trust and for years bore the administrative burdens of this litigation and tending to the 900 Subject Participants. Bank One's conduct was carried out in violation of ERISA, not to gain the trust funds for its employees, but to get them for the benefit of the FDIC. (FF 59)

BY THIS COURT BECAUSE IT REVERSED AND ORDERED DISMISSAL INSTEAD OF REMANDING TO THE DISTRICT COURT TO CONSIDER THE PETITIONERS' UNOPPOSED ALTERNATIVE CLAIM FOR JUDICIAL INSTRUCTIONS IN EVENT OF DENIAL OF THE RELIEF SOUGHT AGAINST BANK ONE.

Petitioners pleaded for instructions to a fiduciary from a court of competent jurisdiction. The relief should be granted. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 113 (1989), citing G. Bogert & G. Bogert, LAW OF TRUSTS AND TRUSTEES § 559 at 162-168 (2d Rev.Ed.1980). *See also*, *Mosser v. Darrow*, 341 U.S. 267, 274 (1951). When some but not all of the participating employers fail, the only way to give effect to the termination and continuation provisions of the trust is to allocate the trust funds between employers that have failed and employers that have not. That is what plan administrator Taylor did, and the district court approved his allocations. (FF 80) By reversing and remanding the district court's opinion with instructions to dismiss, the court of appeals voided the district court's findings on allocation of funds, a critical issue not controverted on appeal, and denied the Petitioners the opportunity in the present litigation to obtain instructions for the disposition of funds. This error is especially serious because the court of appeals itself declined to instruct the Petitioners. (App C)

In their complaint the Petitioners pleaded for the alternative relief that, in the event their primary relief were denied, the court instruct the Petitioners whether trust funds allocable to the non-Failed Bank Participants are payable to the Subject Participants. The Bank One Respondents answered that they did not oppose the alternative relief sought. In response to the petition for rehearing, the Bank

One Respondents stated they did not seek outright dismissal of the whole case, but only reversal with instructions "to dismiss all claims against the Bank One Defendants," and that they believed the Petitioners would benefit from further instructions and guidance on remand to the district court. Nevertheless, the court of appeals let stand its outright reversal with instructions to dismiss.

Rule 8(a),(e)(2), F.R.CIV.P., permits a party to plead for relief in the "alternative" and "alternately or hypothetically". Courts of appellate jurisdiction may remand and require such further proceedings as may be just under the circumstances. 28 U.S.C. § 2106. Appellate courts should not reach a final decision on appeal when the facts are not sufficiently developed to consider an alternative plea. *See, Swanson v. Traer*, 354 U.S. 114 (1957); *Barr v. Matteo*, 355 U.S. 171 (1957); *Bank of America Nat. Trust & Sav. Assoc. v. Parnell*, 352 U.S. 29 (1956); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

III. THE COURT OF APPEALS' STAY ORDER IS CONTRARY TO 12 U.S.C. § 91 AND THE DECISIONS OF THIS COURT AND RAISES AN IMPORTANT MATTER OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

The court of appeals stayed the district court's declaratory judgment on the basis of the federal statute prohibiting "transfers by banks and other acts in contemplation of insolvency". 12 U.S.C. § 91. That statute prohibits the "attachment, injunction or execution against a national bank or its property" before final judgment. No attachment, injunction or execution was ever sought or threatened against Bank One, the Bank One Plan, the Bank One Trust, or their property. No property of Bank One needed protection

because funds to administer and provide benefits under the declaratory judgment were being funded by the FDIC as Bank One's indemnitor. Two parties shielded by the stay are not banks. *See*, ERISA § 502(d)(1),(2), 29 U.S.C. § 1132(d)(1),(2). The declaratory judgment is not functionally equivalent to an injunction or execution. The declaratory judgment does not order the judgment defendants to pay any specific sum of money.

Neither the text of 12 U.S.C. § 91 nor any reported decision gives the statute the far reaching effect of the unpublished stay order. *E.g., Third National Bank in Nashville v. Impac Limited, Inc.*, 432 U.S. 312, 315-16 (1976) (statute does not prohibit prejudgment orders respecting third party's assets); *First National Bank of Selma v. Colby*, 21 Wall. 609 (1874); *Earle v. Pennsylvania*, 178 U.S. 449, 453-54 (1900) (statute does not proscribe writ of attachment sued out against garnishee bank).

The stay order is contrary to the authority cited in the order. *State Bank & Trust Co. v. D.J. Griffin Boat*, 926 F.2d 449 (5th Cir. 1991) (stay against post judgment collection activity); *United States v. LeMaire*, 826 F.2d 387, 390 (5th Cir. 1987), *cert. denied*, 485 U.S. 960 (1988), (upholding injunction against execution "[to prevent] the premature, and potentially fatal, seizure of assets of an operational bank . . . [and to secure] substantial assets essential to a fair and equitable dispersal to creditors of a failed bank . . . "); *United States v. FDIC*, 881 F.2d 207, 209-10 (5th Cir. 1989) (injunction against filing abstract of judgment, which in Texas law is functionally equivalent to attachment or injunction).

The court also cited *Herbert v. Exxon Corp.*, 953 F.2d 936 (5th Cir. 1991), which stayed a declaratory judgment pending appeal because a declaratory judgment

which requires payment of a specific sum of money is also a "monetary" judgment. 953 F.2d at 938. The declaratory judgment of the district court in the case at bar does not require Bank One to pay any specific sum of money, and by analogy to the automatic stay provided by Rule 62(d), F.R.CIV.P., *Herbert* is authority against the court of appeals' stay order in this case. *See, Robbins v. Pepsi-Cola Metropolitan Bottling Co.*, 800 F.2d 641 (7th Cir.1986) (no stay of $26 million interim withdrawal of liability payment because stay would disrupt continuous flow of plan contributions); *Philadelphia Police and Fire Assoc. for Handicapped Children, Inc. v. City of Philadelphia*, 705 F. Supp. 1109 (E.D.Pa. 1989) (no stay of injunction requiring defendants to provide social services to retarded persons).

The Petitioners immediately sought review of the court's stay order by suggestion for rehearing en banc, but Petitioners' suggestion was returned unfiled by the court of appeals. (App D) Petitioners did not seek an extraordinary writ under S.CT.R. 20.1 because the court of appeals had expedited the appeal and had scheduled argument for a short time after issuance of its stay order. Since the merits would be soon heard, Petitioners could not make the required showing to this Court that "adequate relief cannot be obtained in any other form or from any other court." S.CT.R. 20.1. Petitioners believe the court of appeals' stay order was unlawful, and have twice sought review of the order by the court of appeals. If it is the practice of the courts of appeal to stay non-monetary declaratory judgments on the strength of an inapplicable statute and without a complete record, the only feasible way for this Court to review the practice is to consider the stay after the appeal has been decided on the merits. Otherwise, once a court of appeals has acted on the merits, any previous unlawful stay by the appellate court would be outside this Court's review and therefore in derogation of this Court's jurisdiction.

IV. THE COURT OF APPEALS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWERS OF SUPERVISION.

On a partial record, the court of appeals relied on a federal statute to stay the district court's judgment. Had that unpublished order been made public it would have generated great interest at the bench and bar because of the radical and unprecedented gloss it put on the text of 12 U.S.C. § 91 by reversing the district court's published opinion construing 12 U.S.C. § 91. Despite its penchant for making its own fact findings on appeal, the court of appeals declined to give the fiduciary instructions properly sought by the Petitioners and refused to supplement the record to consider relevant evidence withheld from the trial court by Bank One. On a full record, in an opinion that ignored the evidence and the clearly erroneous rule, the court reversed the district court's judgment with instructions to dismiss -- without giving instructions to the fiduciaries as requested by Petitioners' motion for instructions and as requested in Petitioners' alternative plea for relief.

The orders and opinion of the court of appeals are drenched with the expedience of a "result oriented" rather than "rule oriented" jurisprudence. The court's "interpretation" of the plan documents seems to be a pretext for de novo review, and the court's unpublished jurisprudence seems to be actuated by the sentiment that a national bank indemnified by the FDIC should be protected from the legal consequences of its own conduct. Bank One and the FDIC do not need special protection from their conduct as corporate wards of the federal courts.

CONCLUSION

The questions presented by this case are of great moment. The excessive latitude of the court of appeals in its review of the district court's fact findings, the court's refusal to give or permit the district court to give instructions to a fiduciary, its radical and unprecedented expansion of the scope of 12 U.S.C. § 91 and the human consequences to 900 retired and disabled people make this case especially appropriate for exercise of the Court's discretionary jurisdiction. In view of the current crisis among our nation's financial institutions, these matters will all be of recurring significance. This Court should issue a writ of certiorari to review the orders, opinion and judgment in No. 92-7160, *Jimmy F. Taylor, et al. v. Bank One Texas, N.A.*, in the United States Court of Appeals for the Fifth Circuit, reverse the opinion of the court of appeals, and reinstate the district court's judgment.

Respectfully Submitted

JOHN H. BENNETT, JR.

Attorney for Petitioner

Of Counsel:

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APPENDIX A

U.S. COURT OF APPEALS
F I L E D
APR 8 1992
GILBERT F. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7160

JIMMY F. TAYLOR, ET AL.,
Plaintiffs-Appellees,

versus

BANK ONE TEXAS, N.A., ET AL.,
Defendants,
BANK ONE TEXAS, N.A., ET AL.,
Defendants-Appellants.

- - - - - - - - - - - - - -

Appeal from the United States
District Court for the
Southern District of Texas

- - - - - - - - - - - - - -

BEFORE JONES, DUHÉ and WIENER, Circuit Judges.

BY THE COURT :

IT IS ORDERED that Defendants-Appellants' motion for stay of judgment pending appeal is GRANTED as a matter of right pursuant to 12 U.S.C. § 91. *See State Bank & Trust Co. v. D. J. Griffin Boat*, 926 F.2d 449 (5th Cir. 1991) (citing *United States v. Lemaire*, 826 F.2d 387, 390 (5th Cir. 1987), *cert. denied*, 485 U.S. 960, 108 S.Ct. 1223, 99 L.Ed.2d 423 (1988)). *See also Herbert v. Exxon Corp.*, 953 F.2d 936 (5th Cir. 1992).

IT IS FURTHER ORDERED that the appeal of this matter be expedited.

4/8/92

/i/ JWJ JMD EHJ 4/8/92

APPENDIX B

U.S. COURT OF APPEALS
F I L E D
APR 22 1992
GILBERT F. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7160

JIMMY F. TAYLOR, ET AL.,
Plaintiffs-Appellees,

versus

BANK ONE TEXAS, N.A., ET AL.,
Defendants,
BANK ONE TEXAS, N.A., ET AL.,
Defendants-Appellants.

- - - - - - - - - - - - - - -

Appeal from the United States
District Court for the
Southern District of Texas

- - - - - - - - - - - - - - -

BEFORE JONES, DUHÉ and WIENER, Circuit Judges.

BY THE COURT :

IT IS ORDERED that the motion of Appellees, Welfare Plan of Mercantile Employees' Beneficiary Association and the Mercantile Employees' Beneficiary Association Trust, to dissolve the stay is DENIED.

IT IS FURTHER ORDERED that the alternative motion of said Appellees for clarification is GRANTED.

We are well aware that the declaratory judgment we stayed involves both bank and non-bank "judgment debtors," and that said judgment includes both obligations to pay and obligations to perform. We are equally aware that the protection afforded by 12 U.S.C. § 91 is available to judgment debtors which are banks but not to those which are non-banks; and that said statute pertains to judgments expressly or implicitly requiring parties which are banks to pay out funds but not to judgments requiring parties which are banks to do or refrain from doing other acts. Nevertheless, as the relationships of the bank and non-bank parties, and the judgment obligations to pay and to perform, are so inextricably intertwined, bifurcation of the stay order would be difficult if not impossible.

The intended effect of our stay is to maintain the status quo ante the judgment. Consequently, administration of the subject ERISA plans and disbursements to the "Subject Participants" need not be affected by our stay if--but only if--such administration is susceptible of continuation and, more importantly, otherwise proper periodic payments to the Subject Participants can be made from existing funds of the plans or funds obtained from other sources, such as the FDIC, without requiring new funding by the Appellants. We assume that the plans are not and have not been existing hand-to-mouth on day to day funding, but that there is either some accumulation of funds or some other source of short-term funding that allows disbursements to continue without

hardship to the Subject Participants pending the expedited appeal of this cause as ordered. If our assumptions are correct, then if the judgment should be affirmed, those among Appellants who are ultimately determined to have been responsible for contributions to the Plan or trust may be required to reimburse those who shall have provided the funds pending appeal. But if our assumptions are incorrect, then the regrettably dire consequences predicted by Appellees, i.e., the interruption of periodic payments to the Subject Participants, would appear to be unavoidable *unless* Appellees, with or without assistance from Appellants or the district court or both, are able to come up with temporary funding to avoid the otherwise unavoidable consequences.

As for the applicability of our stay order, beyond 12 U.S.C. § 91, to the non-bank Appellants, the stay is intended to suspend the need for any and all non-bank Appellants to make contributions to the Plan in order to fund the payment of benefits to the Subject Participants to the same extent as the stay under 12 U.S.C § 91 operates vis-a-vis the bank Appellants pending appeal. Put as simply as we can, our stay is intended to have the effect of exempting all of the Appellants from that effect of the declaratory judgment that would require the contribution of new money by any of the Appellants pending expedited appeal of the declaratory judgment. Again, disbursements of periodic payments to the Subject Participants are not interdicted by our stay order as long as such disbursements can be made with existing funds or funds obtained from sources other than Appellants.

APPENDIX C

U.S. COURT OF APPEALS
F I L E D
APR 30 1992
GILBERT F. GANUCHEAU
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7160

JIMMY F. TAYLOR, ET AL.,
Plaintiffs-Appellees,

versus

BANK ONE TEXAS, N.A., ET AL.,
Defendants,
BANK ONE TEXAS, N.A., ET AL.,
Defendants-Appellants.

- - - - - - - - - - - - - - -

Appeal from the United States
District Court for the
Southern District of Texas

- - - - - - - - - - - - - - -

BEFORE JONES, DUHÉ and WIENER, Circuit Judges.
BY THE COURT :

IT IS ORDERED that the motion of MEBA Welfare Plan and MEBA Trust for instructions is hereby DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK
GILBERT F. GANUCHEAU
CLERK
TEL.504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

May 6, 1992

Mr. John H. Bennett, Jr.
Attorney at Law
1100 Louisiana
Suite 3350
Houston, TX 77002

No. 92-7160 Jimmy F. Taylor, Et Al. v.
Bank One Texas, Et Al.

- -

Dear Sir:

I have been authorized by the Court to return herewith unfiled your suggestion for rehearing en banc with the advice that the Court does not reconsider en banc orders entered in Administrative-Interim matters which are not dispositive of the appeal.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By /s/ Barry W. Stiebing/klc
Barry W. Stiebing, Chief
Judicial Support Division

BWS:lmc
encls.
cc: Ms. Riva T. Johnson
Mr. Peter F. Lovato, III

APPENDIX E

U.S. COURT OF APPEALS
F I L E D
OCT 1 1992
RICHARD E. WINDHORST, JR.
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7160

JIMMY F. TAYLOR, ET AL.,
Plaintiffs-Appellees,

versus

BANK ONE TEXAS, N.A., ET AL.,
Defendants,
BANK ONE TEXAS, N.A., ET AL.,
Defendants-Appellants.

- - - - - - - - - -

Appeal from the United States
District Court for the
Southern District of Texas

- - - - - - - - - -

O R D E R :

IT IS ORDERED that the motion of appellees to supplement the record with newly discovered evidence is DENIED.

/s/ Edith H. Jones
UNITED STATES CIRCUIT JUDGE

APPENDIX F

U.S. COURT OF APPEALS
F I L E D
APR 22 1993
RICHARD E. WINDHORST, JR.
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7160

JIMMY F. TAYLOR, ET AL.,
Plaintiffs-Appellees

versus

BANK ONE TEXAS, N.A., ET AL.,
Defendants,

BANK ONE TEXAS, N.A., ET AL.,
Defendants-Appellants.

Appeal from the United States
District Court for the
Southern District of Texas
(CA H-90-3815)

Before HIGGINBOTHAM, JONES, and DeMOSS, Circuit Judges.*

EDITH H. JONES, Circuit Judge:

This is a contract interpretation case in which the terms of the contract seem to have been lost sight of. When the Texas MBank group failed in early 1989, FDIC arranged an overnight sale to a company later known as Bank One. The Purchase and Assumption Agreements executed between Bank One and FDIC covered enumerated assets and liabilities of 20 of 26 MBanks. Among the questions presented to us are whether these agreements or the documents constituting the MBank employees' Welfare Plan and Trust Agreement fastened liability on Bank One for welfare benefits to retired and disabled employees of MBank who never worked for Bank One. The district court held that they did. The district court rested its holding alternatively on other legal theories, and it granted declaratory and injunctive relief supporting its decision. Upon the district court's refusal to stay its judgment pending appeal, this court issued a stay, *see* F. Rule App. Proc. 8, and having heard the case on the merits, we must reverse.

MCorp owned, directly or indirectly, twenty-six Texas banking associations whose names include "MBank" until March 28, 1989, when twenty of them were declared

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled and principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

insolvent by the Office of the Comptroller of the Currency. FDIC, as receiver for each of the failed MBanks, immediately sold certain assets and transferred certain liabilities to the purchaser Deposit Insurance Bridge Bank, N.A. (Bridge Bank), pursuant to twenty separate but essentially identical purchase and assumption (P&A) agreements. The active employees of the failed MBanks went to work for Bridge Bank on the morning of March 29. This employee group obviously did not include the retired and disabled MBank employees who have filed this lawsuit.

Before its failure, MCorp was the sponsor of several welfare benefit plans, as defined by section 3(1) of ERISA, that are collectively known as the MEBA Welfare Plan. The failed MBanks were participating employers in the MEBA Welfare Plan which, together with the MEBA Trust Agreement, provided the basic structure for the welfare benefits.

Upon opening for business, Bridge Bank established a benefit plan for the Bridge Bank employees, including new policies for life, business travel, accident, accidental death and dismemberment insurance and a benefit administration contract with Prudential. The retired and disabled employees of MBank (the "Subject Participants") were not designated as beneficiaries of these plans.

When, on May 5, 1989, the Bridge Bank Board of Directors retroactively adopted formal documentation of the Bridge Bank Welfare Plan and Trust, they specifically limited participation to Bridge Bank employees.

At the time of the MBank failures, the MEBA Trust held approximately $6.2 million in assets. Under Article 11 of the MEBA Trust, Bridge Bank sought a transfer of a share of its funds proportionate to the entitlement of the new

Bridge Bank employees. MCorp, however, refused to recognize the Bridge Bank Trust as a successor trust, and no funds were transferred. MCorp consistently took the position that Bridge Bank was not and could not become a successor employer or establish a successor trust under the MEBA Plan and Trust without MCorp's approval, which it withheld. As a result, the MEBA Trust was instructed neither to accept trust contributions from Bridge Bank nor to pay claims of any active or former Bridge Bank employees accrued after March 31, 1989.

While Bridge Bank has provided no benefits to the Subject Participants, the MEBA Trust has continued to do so from its dwindling funds. Neither MCorp nor the MEBA Trust not Bridge Bank Trust notified the Subject Participants of a termination of their benefits.

As of June 9, 1989, if Bridge Bank had ever been a participating employer in the MEBA Plan and Trust, it effected its withdrawal by notice given thirty days earlier.

COURSE OF PROCEEDINGS

This action was filed in December 1990 by the Administrative Committee of the MEBA Plan and the Trustee of the MEBA Trust, Jimmy Taylor, seeking a declaration that Bank One, the purchaser of Bridge Bank, was responsible for the provision of welfare benefits to the 900 Subject Participants, retired and disabled employees of the failed MBanks. Bank One argued to the district court that the contractual documents absolved it of responsibility for the payment of welfare benefits to the Subject Participants. Alternatively, Bank One contended that if such documents did initially transfer this liability to Bridge Bank under the MEBA Plan, it withdrew no later than June 9, 1989. Further, Bank One stated that it had no legal obligation under

ERISA to continue paying benefits to MBank's retired employees.

After trial, the district court entered extensive findings of fact and conclusions of law holding that (1) Bank One elected to become a participating employer in the MEBA Plan and Trust as a successor to the failed banks as of March 29, 1989; (2) by electing to become a successor under the MEBA Plan and Trust, Bridge Bank assumed the duties and responsibilities of those agreements and remains liable for benefits to the Subject Participants; and (3) those former employees should receive a perpetual right to the same benefits as similarly situated Bank One employees. The district court alternatively founded its declaration of liability on principles of corporate successorship, the purchase and assumption agreements between FDIC and Bridge Bank, section 510 of ERISA, and equitable estoppel.

Bank One timely appealed.[1]

STANDARD OF REVIEW

The district court's conclusion of law are reviewed *de novo*, and findings of fact are upheld unless they are clearly erroneous. Fed. R. Civ. Proc. 52. Contract interpretation is generally reviewed under a *de novo* standard, that is, the reviewing court does not defer to the district court's interpretation of the contract as long as the interpretation is within the four corners of the contract. *Pierre v. Connecticut General Life Ins. Co.*, 932 F.2d 1552, 1561 (5th Cir. 1991). *Gulf, Colorado & Santa Fe Railway Co. v.*

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1. MCorp has filed an appellee's brief avowing that it is not liable for anything and no claim was asserted against it. As far as we can tell Bank One still makes no claim against MCorp, and its response will not be further considered.

Coca Cola Bottling Co., 363 F.2d 465, 467 (5th Cir. 1966). If, however, the interpretation of the contract turns on the consideration of extrinsic evidence, such as evidence of the intent of the party, the standard review is the clearly erroneous one. *Carpenters Amended and Restated Health Benefit Fund v. Holleman Construction, Co.*, 751 F.2d 763, 766 (5th Cir. 1985).

DISCUSSION

A. The MEBA Plan and Trust Agreement.

In finding that Bridge Bank became a participating employer in the MEBA Plan and Trust Agreement, the district court equated that term with Bridge Bank's successorship to assets of the failed MBanks and to Bridge Bank's decision to form a successor welfare plan and trust for Bridge Bank employees. The district court also relied on what Bridge Bank allegedly *did not do* in trying to set up a successor welfare plan between March 29, 1989 and May 5, 1989, the date its Board of Directors formally authorized the Bridge Bank Welfare Plan and Trust. The district court firmly believed that Bridge Bank did nothing sufficient to disclaim responsibility for providing benefits to the Subject Participants, and while telling Bridge Bank employees that their welfare plan would continue unabated, Bridge Bank did not qualify that promise by expressly rejecting a continuation of rights for the Subject Participants.

The fundamental difficulty with the district court's characterization of Bridge Bank's actions rests in the court's equation between successorship and participating employer status under the MEBA Plant and Trust Agreement. This equation misreads those contracts. No party has argued that the MEBA Plan and Trust Agreement are ambiguous. Article XI of the MEBA Trust affords three options in the

event of a change of control of a participating "Employer": (1) the Trust may be dissolved under section 11.01 and the proceeds distributed pro rata to the participants and beneficiaries of that "employer"; (2) a successor "may elect to continue this trust by *adopting this trust agreement* . . ." (emphasis added); or (3) a successor may establish a separate plan and trust for continuation of benefits for its employees, triggering a transfer of trust assets to the trustee of the new trust.[2]

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2. Art. XI states:

> 11.02 *Termination of Trust Fund.* This trust agreement and the trust created hereby may be terminated at any time by the Board of Directors or by the president or the chief personnel officer of the company, or the trust may be terminated, with respect to any other Employer by its board of directors of its president or chief personnel officer, and upon such termination, or upon the dissolution or liquidation of any Employer in the event that a successor to the Employer by operation of law or by the acquisition of its business interests shall not elect to continue the Plan and this trust, the Trust Fund, with respect to such Employer, shall be paid out by the Trustee in the form of distributions to or for the benefit of Participants and Beneficiaries as and when directed by the Committee in accordance with the provisions of the Plan and Article III hereof.
>
> 11.02 *Continuation by Employer's Successor.* Any corporation succeeding to the interest of an Employer by sale, transfer, consolidation, merger or bankruptcy, may elect to continue this trust by adopting this trust agreement or by otherwise assuming the duties and responsibilities of the Plan and trust in accordance with the provisions of Section 10.02 hereof, or such corporation may establish a separate plan and trust for the continuation of benefits for its employees, in which event the trust assets, held on behalf of the employees of the prior Employer, shall be transferred

Taylor has contended, and the district court agreed, that he was torn between performance under the first two options, while Bank One argues that Bridge Bank deliberately chose the third option.[3] Curiously, Taylor's briefs nowhere refer to the possibility that Bridge Bank could exercise the third listed option. The district court's opinion also fails to address this option specifically, although the court may have thought it was inferentially disposing of the third option by holding that Bridge Bank did not actually establish its own separate welfare plan and trust until it approved formal documents for those purposes on May 5, 1989. The district court erred as a matter of law, however, in concluding that Bank One, whether intentionally or not, elected under the second option to "adopt" the MEBA Plan and Trust Agreement. Under these documents, Bridge Bank could not have "adopted" the MEBA Plan and Trust, but it did establish a separate welfare plan and trust agreement providing coverage only to its employees as of March 29, 1989.

Contrary to the district court's findings and conclusions[4], the act of "adopting the trust agreement" could not be committed unilaterally by Bridge Bank. Instead, adoption of the Trust Agreement is governed by section 10.02 of the Trust in the following terms:

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to the trustee of the new trust.

3. Notwithstanding his "dilemma," Taylor continued to pay benefits from the MEBA Trust to Subject Participants during this litigation.

4. The district court's holding that Bridge Bank adopted the MEBA Plan and Trust Agreement, whether denominated a finding of fact or conclusion of law, rests on the court's erroneous legal equation of "successorship" with "participating employer status" under the documents.

> *Adoption by Other Employers.* Any Employer which is eligible to and does in fact adopt the Plan, may adopt this trust by written instrument . . .

Further, "Employer" is defined in section 1.06 of the Trust Agreement to include "the successor of" Mercantile Texas Corporation (later MCorp, the "Company") and any "Affiliate" of the Company; an affiliate is defined under section 1.01 of the Trust Agreement as a company owned or controlled by the Company. The section 10.02 adoption procedure thus applied to Bridge Bank as a successor to the failed MBanks, and that section also requires as a pre-condition of adopting the Trust Agreement that the "Employer" is "eligible to and does in fact adopt the Plan." The "Plan" is the MEBA Welfare Plan.

Adoption of the MEBA Plan depends, in turn, upon the conditions set out in its section 10.2.[5] Section 10.2

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5. Section 10.2 of the MEBA Plan provides in pertinent part:

> 10.2 *Adoption of Plan by Employers.* The Company and any corporation or business enterprise, now in existence or hereafter formed, which is or becomes affiliated with the Company may, with the consent and approval of the Compensation Committee of the Board of Directors of the Company, and through action of such corporation's or enterprise's Board of Directors or other governing authority (or through action of an officer or committee duly authorized or ratified by such corporation's or enterprise's Board of Directors or other governing authority), adopt this Plan or any Benefit Plan hereunder for its Employees. Adoption of this Plan shall constitute adoption of all Benefit Plans hereunder, unless resolutions of the Compensation Committee of the Board of Directors of the Company and of the Board of Directors or other governing authority of the Employer provide otherwise.

permits the Company and any "affiliated" corporation, with the consent and approval of the Company's Compensation Committee of the Board of Directors, to adopt the Plan. To adopt the Trust Agreement, therefore, an "employer" must also have "adopted the Plan", which it could only do with the consent and approval of the Company as specified. Even if the requirement of affiliation with the Company is not an explicit requirement for adoption of the Plan and Trust Agreement,[6] there is no doubt that under section 10.02 of the Trust Agreement, which incorporates section 10.2 of the MEBA Plan, the Company's approval to adopt the plan is a prerequisite. At a minimum, MCorp (the Company) never approved Bridge Bank's actions *vis-a-vis* the MEBA Plan and Trust Agreement.

Having overlooked the requirement for Company approval, the district court's holding that Bridge Bank "adopted the Trust Agreement" is already flawed.

The court's opinion further misconstrues Bridge Bank's actions under section 11.02 of the MEBA Trust as a de facto "adoption" of the MEBA Plan and Trust Agreement. The district court cites Bridge Bank's May 5, 1989 Board of Directors resolution and the preambles to the Bridge Bank

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Any such corporation or enterprise adopting this Plan shall be referred to as an "Employer".

6. Taylor argues that § 11.01 of the MEBA Trust dispenses with the requirement of "affiliation", as it suggests that if a successor to the Employer "by operation of law" or by "acquisition of its business interests" "shall not elect to continue the Plan and this trust," the Trust shall be dissolved and proceeds distributed. That is a possible reading of the provision. A more likely interpretation would treat the "election" in § 11.01 as a shorthand reference to the options facing a successor employer in § 11.02, which, as seen, inevitably leads back to requirements of affiliation and approval by MCorp.

Welfare Plan and Trust Agreement as evidence that Bridge Bank adopted the MEBA Plan and Trust Agreement. In the resolution, however, the Board of Directors stated only:

> that "each of the Failed Banks was a participating employer" in the MEBA Plan;
>
> that under section 10.4 of the MEBA Plan and section 11.02 of the Trust Agreement, a participating employer could withdraw from the welfare plans and establish a separate plan and trust;
>
> and that accordingly, "it is in the best interest of the employees of Bridge Bank" to establish a successor plan and trust.

Several points should be noted about this resolution. First, it nowhere explicitly purports to "adopt" the MEBA Plan and Trust Agreement. It refers in general terms to section 11.02 of the Trust Agreement, which, as has been seen, afforded two distinct separation options for Bridge Bank other than outright liquidation of the Trust. The resolution was intended to set up Bridge Bank's own welfare plan and trust as contemplated by the third option in Article XI of the MEBA trust. Moreover, purporting to execute a withdrawal from the MEBA Plan and Trust on behalf of its employees does not amount to an unequivocal admission by Bridge Bank that the MEBA Plan and Trust were "Adopted" to begin with. In the same corporate resolution, the Board specifically adopted the MCorp Pension Plan and the MCorp Moneymax Plan, actions that by negative inference disprove their intent to "adopt" the MEBA Plan and Trust Agreement in the same document without saying so.

Further, although the preambles to the Bridge Bank Plan and Trust describe Bridge Bank as having been a "participating employer" in MCorp's welfare benefit plans, we reiterate that Bridge Bank could not effectively unilaterally declare itself a participating employer. MCorp's approval was mandatory under the MEBA Plan and Trust, yet conspicuously lacking.[7]

The district court fortified its theory of Bridge Bank's implicit adoption of the MEBA Plan and Trust by reciting two lists of findings. In the first list, the district court emphasized the similarities and continuities between the MEBA Welfare Plan provisions and the provisions under which Bridge Bank's successor plan operated from March 29 thru May 5, 1989.[8] In the second list, the district court enumerated what Bridge Bank did not do to formalize its successor welfare plan and trust agreement during that period.[9] These facts implied to the district court that Bridge Bank must have become or remained a participating employer under the MEBA Welfare Plan and Trust.

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7. The general confusion resulting from the MBanks' failure undoubtedly led to Bridge Bank's attempt to preserve its options with regard to the welfare benefit rights of its employees. Neither the act of describing itself as a "participating employer," however, nor of "withdrawing" from the MEBA Plan and Trust alter the controlling terms of those documents.

8. No new deductibles were required; the lifetime medical limit was retained; the pricetags for coverage were identical; Bridge Bank continued to collect premiums from retired and disabled employees, until it finally arranged to turn those premiums over to the MEBA Trust.

9. Bridge Bank did not promptly file an IRS Form 1024 notice to qualify its plan for tax-exempt status; it did not require its employees to re-enroll in the plan; it did not communicate with the Subject Participants to inform them that the Bridge Bank plan would not cover them; it did not prepare new summary plan descriptions.

Alternatively, the district court may have intended by means of these lists to demonstrate that, because Bridge Bank did not properly set up successor welfare plans and trusts before May 5, it could not have elected to proceed under the third option described by the MEBA Trust Agreement for disposing of trust assets on a change of corporate control.

Again, however, the district court premised its findings on an erroneous view of the law. Establishing a plan is not dependent upon meeting technical ERISA requirements as of the first day of its operation. *Memorial Hospital*, 904 F.2d at 241; *Holcomb v. Pilot Life Insurance Co.*, 754 F. Supp. 524, 529 (N.D. Miss. 1991); *Comprehensive Care Corp. v. Doughtry*, 682 F. Supp. 516, 517 (S.D. Florida 1988)' *Blau v. Del Monte*, 748 F.2d 1348, 1352 (9th Cir. 1985); *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982).

In determining whether a plan has been established under ERISA, a court snould focus on the intent of the employer and its involvement with the administration of the plan. *Hansen v. Continental Insurance Co* , 940 F.2d 971, 978 (5th Cir. 1991); *Gahn v. Allstate Life Insurance Co.*, 926 F.2d 1449, 1452 (5th Cir. 1991). When the evidence shows that (1) the employer had the intent to provide its employees with a welfare benefit plan and (2) carried out that intent by means of the purchase and maintenance of a group insurance policy, a plan has been established. *Foxworth v. Durham Life Insurance Co.*, 745 F. Supp. 1227, 1230 (S. D. Miss.) (quoting *Memorial Hospital*). Thus, a welfare plan is established "if from the surrounding circumstances a reasonable person can ascertain that intended benefits, a class of beneficiaries, a source of financing, and procedures for welfare benefits." *Memorial Hospital Systems v. The Northbrook Life Insurance Co.*, 904 F.2d 236, 240 (5th Cir. 1990).

Applying the test in *Hansen* and *Memorial Hospital*, Bridge Bank established a welfare plan of its own on the first day of Bridge Bank's operation. The overwhelming and uncontradicted evidence at trial shows that Bridge Bank, through its benefits administrator, intended to set up a plan new and distinct from the MEBA Welfare Plan. *Taggart v. Life and Health Benefits Administration*, 617 F.2d 1208, 1211 (5th Cir. 1980) (noting the importance of an independent benefit administrator). Bridge Bank carried out its intent to set up a new employee welfare plan for its 7,000 employees through the purchase and maintenance of new group insurance policy and through distinct administration of benefits commencing March 29, 1989.

That Bridge Bank elected to continue the scope of coverage and "price tags" and did not require its employees to re-enroll, reaccumulate deductibles or commence new lifetime medical limits do not show, as the district court supposed, an intent to operate under the MEBA Plan. Nor does Bridge Bank's description of its plan as a "successor" to the MEBA Plan talismanically transform the later plan into a part of its predecessor. These facts are consistent with Bridge Bank's expressed intent to maintain continuity of coverage, and no more. They do not contradict Bridge Bank's having established its own welfare benefit plans, through independently secured insurance policies and an independent administrator, effective March 29.

To sum up, there are several critical deficiencies in the district court's application of the MEBA Plan and Trust Agreement in this case. The proper reading demonstrates that Bridge Bank could not have "adopted" the MEBA Plan documents without MCorp's consent, which was never given. Further, Bridge Bank did not fail to set up its own separate welfare plan and trust when it opened for business, and thus did not slide by accident into becoming or remaining a

participating "Employer" in the MEBA Welfare Plan and Trust.

B. The Purchase and Assumption Agreements

The district court somewhat offhandedly held that the Purchase and Assumption Agreements whereby Bridge Bank acquired the failed MBanks also support his holding Bank One liable under the MEBA Plan and Trust Agreement. In determining the scope of the Purchase and Assumption Agreements, it is critical to remember the context in which they were executed. MBank had been placed in receivership by FDIC. The controlling law on transfer of liabilities is 12 U.S.C. § 1821(i)(1)(B) (West Supp. 1989), which states that one acquiring a bank from the FDIC incurs "such other liabilities of the closed bank as the [FDIC] in the [FDIC's] discretion may determine to be appropriate."

In this case, the FDIC listed the liabilities that Bridge Bank would assume in § 2.1 of the P&A Agreements. Section 2.1 of the P&A Agreements lists specific liabilities to be assumed and "none other". Not only does this wording unambiguously convey the exclusive nature of liabilities assumed, but the comprehensive list of liabilities in section 2.1 makes no mention of a welfare benefit plan.[10] By

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10. Section 2.1 of the P&A Agreements provides in relevant part:

> 2.1 *Liabilities Assumed.* The *Assuming Bank hereby expressly assumes* at Book Value and agrees to pay, perform and discharge all of the *following liabilities* of the Failed Bank which, in normal commercial banking practice would be reflected on the books of the Failed Bank, whether or not they are reflected on the books of the Failed Bank as of Bank Closing, *and none other*:
>
> (i). . . liabilities which have vested on or before Bank Closing under or

omitting any reference to such plans in section 2.1, while expressly including certain pension, profit sharing and stock ownership plans, the P&A Agreements clearly provided that no such liability would flow to Bridge Bank. One other provision of the P&A Agreements, section 4.8, relates to the assumption of liabilities for employee benefits, but it is expressly limited to pension, profit sharing and stock ownership plans. Therefore, the P&A Agreements did not pass to Bridge Bank the liability for welfare benefits under the MEBA Plan.

Taylor does not contradict the unambiguous provisions of section 2.1 but instead relies, as the district court did, on section 4.7(a) dealing with trust business. This section concerns the assumption of liabilities of trusts managed by the failed MBanks. Taylor's attempt to read it broadly to contradict the express provisions of section 2.1 and to impose fiduciary duties on Bank One to the retired and disabled MBank employees must fail. The liability in this case is sought to be imposed on Bank One directly as a

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with respect to the Failed Bank *employees' pension, profit sharing or stock ownership plans*, if any; liabilities for administration of any such plan in accordance with the terms of any such plan on or after Bank Closing, if any; *provided, that* liabilities described in this subparagraph (i) with respect to any such plans shall not be assumed by the Assuming Bank in the event any such plan is determined by the Receiver, in its discretion, to be inadequately funded as of Bank Closing.

matter of contract and not on Bank One in a fiduciary capacity.[11]

C. The Effect of ERISA Law on Bank One's Liability as a Successor Employer

The district court relied on several additional theories purporting to hold Bank One liable: corporate successorship liability by operation of law; equitable estoppel; and ERISA § 510. The first two of these theories clash headlong at the outset with Congressional intent that employee welfare plans are to be treated differently from pension plans.

ERISA draws a distinct line between employee welfare benefit plans and employee pension plans, specifically exempting welfare benefit plans from the participation, coverage, vesting and funding rules of ERISA. This exclusion was clearly deliberate, *see e.g.* H.R. Rep. No. 807, 93d Cong. 2d Sess. 60 (1974), and has been enforced in caselaw. There is little dispute that "ERISA imposes upon pension plans a variety of substantive requirements relating to participation, funding, investing . . . it also establishes various uniform procedural standards concerning reporting, disclosure and producer responsibility for both pension and welfare plans. It does not regulate the substantive content of welfare benefit plans." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 731, 105 S. Ct. 2380, 2385, 85 L.Ed.2d 728 (1985); *In re White Farm Equipment*, 788 F.2d 1186, 1193 (6th Cir. 1986) (noting, "Congress recognized the differences between welfare benefit plans and pension plans, and we discern no basis for finding

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11. Because the P&A Agreements do not impose contractual liability to the Subject Participants on Bank One, we need not reach the parties' arguments whether third parties have standing to enforce the P&A Agreements.

mandatory vesting in ERISA of retiree welfare benefits . . . we believe the legislature rather than the court should determine whether mandatory vesting of retirement benefits is appropriate."); *Turner v. Local Union No. 302, Intn'l Brotherhood of Teamsters*, 604 F.2d 1219, 12256 (9th Cir. 1979) (court distinguishes between pension plans and health and welfare benefits in construing ambiguous languages limiting the contract term). Similarly, in *Sutton v. Weirton Steel Division of National Steel Corp.*, 774 F.2d 406 (4th Cir. 1983), the Fourth Circuit found that ERISA's vesting rules do not encompass benefits other than pension benefits which commence after normal retirement age. The court stated that ERISA was not designed to protect such ancillary benefits because "vesting of these ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income . . . an employer may change such benefits without violating ERISA.: *Id.* at 410.

Based on this understanding of ERISA, *White Farm* held that "the parties may themselves set out by agreement or by private design, as set out in the plan documents, whether retiree welfare benefits vest, or whether they may be terminated." *White Farm*, 788 F.2d at 1193. Subsequently, the Sixth Circuit examined a corporation's establishment of an employee retirement benefits plan that provided an express reservation of the power to amend or terminate the plan at any time. When the defendant amended the plan to require partial payment of health premiums by retired employees, those employees sued, claiming a breach of fiduciary duty. The court held against them and explained that "the defendant had no fiduciary duty to establish any medical insurance plan, much less one that could never be amended without approval of those to whom it applied." The court found it "hard to see how a company's express reservation of a right to amend the plan can be said to

constitute overreaching" when a prudent employer . . .could well have decided . . . not to provide such coverage at all . . ." *Musto v. American General Corp.*, 861 F.2d 897, 912 (6th Cir. 1988); *Adams v. Avondale Industries*, 905 F.2d 943, 949 (6th Cir. 1990).[12]

These principles overcome the district court's holding, drawn solely from analogy with labor law and Title VII cases, that corporate successorship or equitable estoppel theories conferred liability as a matter of law on Bank One for welfare benefits of the Subject Participants. ERISA does not so provide.

Taylor, however, deftly relies on that part of the district court's holding which seems to recognize that neither of those theories is alone sufficient to prevent an employer or successor to an employer from modifying an ERISA welfare benefits plan. Under ERISA, successorship or estoppel liability might result if the employer has acted contrary to the terms of the governing contracts or welfare plan documents. Taylor accordingly contends that because Bridge Bank "adopted" the MEBA Plan and Trust, it included the Subject Participants by virtue of being a "participating employer" from and after March 28, 1989, and it violated the Subject Participants' rights by purporting to exclude them later. Taylor uses successorship and estoppel cases to support these conclusions.

---

12. *District 17, district 29, Local Union 7113 and Local Union 6023 United Mine Workers of America v. Allied Corporation*, 735 F.2d 121 (4th Cir. 1984) is also instructive, if not completely on point, in that it holds that a transferring company which purchased an employer's coal mining assets did not breach a wage agreement between employer and union by not assuming the employer's obligation toward retired employees to pay health benefits. *Id.* at 128.

Our holding that Bridge Bank did not adopt the MEBA Plan and Trust Agreement vitiates this argument. Bridge Bank could only have acceded to liability for the Subject Participants' welfare benefits if it adopted the MEBA Plan and Trust, for it did not expressly cover them in its own welfare plan.[13] As Bridge Bank did not adopt the MEBA Plan, no extracontractual liability can attach on that basis.

Finally, ERISA section 510 cannot impose liability on Bank One for discriminatory treatment of the Subject Participants because, under the foregoing discussion, Bank One never assumed or acquired liability for providing them welfare benefits. They were neither employees of Bridge Bank nor participants in any Bridge Bank Welfare Plan and Trust. Taylor's arguments and the district court's holding on section 510 liability rest on incorrect premises.

CONCLUSION

Like the district court, we are touched by the plight of the Subject Participants. We cannot agree, however, that Bridge Bank legally bound itself to assume responsibility for their welfare benefits or that such liability can be imposed here absent Bank One's knowing consent. Neither Bank One, the Bridge Bank Plan or the Bridge Bank Trust is liable to provide welfare benefits to the Subject Participants. The judgment of the district court, which declared rights and obligations among the parties and retained jurisdiction over the case, is therefore REVERSED and REMANDED with instructions to DISMISS.

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13. Bridge Bank also points out that even under the third option for withdrawal from the MEBA Trust, as earlier discussed in regard to section 11.02, it was entitled to set up a welfare benefit plan "for its employees", a term that appears to exclude participation by retirees of the predecessor entity.

APPENDIX G

U.S.COURT OF APPEALS
F I L E D
JUL 15 1993
RICHARD E. WINDHORST, JR.
CLERK
Iss'd 7/15/93

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7160

JIMMY F. TAYLOR, ET AL.,
Plaintiffs-Appellees,

versus

BANK ONE OF TEXAS, N.A., ET AL.,
Defendants,

BANK ONE TEXAS, N.A., ET AL.,
Defendants-Appellants.

- - - - - - - - - - - - - - -

Appeal from the United States District Court
for the Southern District of Texas

- - - - - - - - - - - - - - -

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 22, 1993, 5 Cir., ___, ___ F.2d ___)

(July 15, 1993)

Before HIGGINBOTHAM, JONES and DeMOSS, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX H

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

RICHARD E. WINDHORST, JR. TEL. 504-589-6514
CLERK 600 CAMP STREET
NEW ORLEANS, LA 70130

August 3, 1993

Mr. John H. Bennett, Jr.
Attorney at Law
1100 Louisiana, Suite 1700
Houston, TX 77002

No. 92-7160 - TAYLOR -vs- BANK ONE OF TEXAS
- -
D.C. No. CA-H90-3815)

MANDATE STAYED TO AND INCLUDING
SEPTEMBER 2, 1993

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 10, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should

not be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that court.

A copy of the opinion, judgment, or Rule 47.6 Decision, and denial of rehearing are still required by the Supreme Court to incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

RICHARD E. WINDHORST, JR., Clerk

By: /s/ Mary Frances Vrsaljko
Deputy Clerk

Enclosures

cc: Mr. Riva T. Johnson
Mr. Marta G. Andrews and
Mr. Edward F. Fernandes
Mr. Peter F. Lovato, III

APPENDIX I

JAN 15 1992
(illegible)
By Deputy N Ruhaak

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JIMMY F. TAYLOR, as the Administrative Committee, and for and on behalf of the WELFARE PLAN OF MERCANTILE EMPLOYEES' BENEFICIARY ASSOCIATION, AND AMERITRUST TEXAS, N.A., TRUSTEE OF Mercantile Employees' Beneficiary Association Trust	§	
	§	C.A. NO.
Plaintiffs	§	H-90-3815
VS.	§	
	§	
BANK ONE, TEXAS, N.A., the DEPOSIT INSURANCE BRIDGE BANK EMPLOYEES' BENEFICIARY ASSOCIATION TRUST, the WELFARE PLAN OF BANK ONE, TEXAS, EMPLOYEES' BENEFICIARY ASSOCIATION, BANC ONE MORTGAGE COMPANY OF TEXAS, f/k/a MBANK MORTGAGE COMPANY, MCORP, MCORP FINANCIAL, and MCORP MANAGEMENT	§	
	§	
Defendants	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for non-jury trial, before this Court, on November 13-15, 1991. The case was excellently prepared and presented, by both sides. Not only was the Court privileged to witness exceptional advocacy, by all counsel involved in the case but the Court had the additional privilege of meeting and listening to some remarkable witnesses. This Court is absolutely convinced that this case involves no wrongdoing on the part of anyone, and the Court perceives sincerely high motives on the part of all concerned. Unfortunately, that only makes this decision all the more difficult. From a legal standpoint. this Court must address an important issue of first impression: which is paramount between the F.D.I.C., and its need for transaction finality in the reorganization of failed banks, or E.R.I.S.A., which safeguards the rights of the employees of such institutions. Factually, and on a much more human level, this Court is faced with balancing the legitimate needs of Plaintiffs, representing the interest of numerous retired and disabled former employees, who have every right to be secure in their retirement, and to be provided with adequate medical insurance and related benefits, against the equally legitimate needs of a fledgling bank, which, like the Phoenix, arose from the ashes of the demise of a predecessor entity, and their respective welfare and benefits plans, the integrity of which this Court must take pains to properly protect. Out of such disparate interests in this case, each seeking only fairness, this Court must fashion a remedy that tries to achieve justice.

It is with that high purpose in mind, and the Court's full knowledge of and appreciation of the needs of the respective parties, that the Court hereby enters the following Findings of Fact and Conclusions of Law, issued pursuant to F. R. Civ. P. Rule 52(a). Any finding of fact which may be

a conclusion of law is adopted as such, and any conclusion of law which may be a finding of fact is adopted as such. Findings of fact not expressly made are deemed made in support of the Judgment.

FINDINGS OF FACT

1. Defendant MCorp is the owner of Defendant MCorp Financial and Defendant MCorp Management, which respectively own and manage Texas banking associations whose names include "MBank." Since March 1989, MCorp, MCorp Financial and MCorp Management have operated under Chapter 11 bankruptcy proceedings pending in the United States Bankruptcy Court for the Southern District of Texas. (PTO Adm 16).

2. MCorp is the sponsor of several "welfare benefit plans" (as defined by Sec. 3 (1) of the Employee Retirement Income Security Act of 1974) (E.R.I.S.A.), that are included within the MCorp Cafeteria Plan and are collectively known as the Mercantile Employees' Beneficiary Association Plan (the "MEBA Welfare Plan"). Plaintiff Jimmy F. Taylor administers welfare benefits under the MEBA Welfare Plan. (PTO Adm 1).

3. The funding medium for the MEBA Welfare Plan is Plaintiff, the Mercantile Employees' Beneficiary Association Trust (the "MEBA Trust"). The Trustee for the MEBA Trust is Ameritrust Texas, N.A., a company that was formerly known as MTrust Corp, N.A. (PTO Adm 7 and 8).

4. Plaintiff Jimmy F. Taylor is familiar with both the Plan and the Trust. In his view, trustees of the Trust take directions for disbursements from the Plan's Committee.

According to Sec. 11, of the Trust Document, if one of the employers fails, funds are immediately dedicated to beneficiaries, regardless of who contributed them. (Exh. 1).

5. Deposit Insurance Bridge Bank, National Association (the Bridge Bank") is a statewide national banking association that was chartered and owned on March 28, 1989 by the Federal Deposit Insurance Corporation ("FDIC"). The Bridge Bank changed its name to Bank One, Texas, N.A. ("Bank One") when Banc One Corporation began to manage the Bridge Bank. Later, the FDIC sold stock in the Bridge Bank to Banc One Corporation. (PTO SC 3). References to Bridge Bank and Bank One N.A. are interchangeable.

6. On March 28, 1989, the Office of the Comptroller of Currency declared twenty of the MBanks insolvent: MBank Abilene, N.A., MBank Corsicana, N.A., MBank Dallas, N.A., MBank Marshall, N.A., MBank Mid Cities, N.A., MBank Wichita Falls, N.A., MBank Houston, N.A., MBank The Woodlands, N.A., MBank Denton County, N.A., MBank Orange, N.A., MBank Sherman, N.A., MBank Alamo, N.A., MBank Austin, N.A., MBank Brenham, N.A., MBank Odessa, N.A., MBank Round Rock, N.A., MBank Greenville, N.A., MBank Longview, N.A., MBank Fort Worth, N.A., and MBank Jefferson County, N.A. For convenience the MBanks that were declared insolvent are referred to as the "Failed Banks" to distinguish them from several other MBanks that were not declared insolvent and that continued in business. (PTO Adm 17).

7. On March 28, 1989, the FDIC was appointed Receiver for each of the Failed Banks. On March 28, 1989, the Receiver for each Failed Bank sold certain assets to Deposit Insurance Bridge Bank, National Association (the "Bridge Bank"). The Bridge Bank purchases those assets

from the Receiver and assumed certain liabilities pursuant to twenty separate Purchase and Assumption Agreements. (*See*, *e.g.* Exh. 16). For purposes of this case the Purchase and Assumption Agreements may be considered identical. (PTO Adm 20) The employees of the Failed Banks went to work for Bridge Bank the morning of March 29, 1989. (PTO SC 4).

8. On May 5, 1989 Bridge Bank established Defendant, the Deposit Insurance Bridge Bank Voluntary Employees' Beneficiary Association (the "Bridge Bank Welfare Plan"). (PTO Adm 21).

9. On May 5, 1989, the MCorp Compensation Committee undertook an extraordinary meeting, at which it discussed MCorp's benefit plans. The meeting was apparently urgent, because MCorp was collapsing. Bridge Bank was thinking about participating only long enough to withdraw funds, intending to thereafter "freeze out" former employees. An amendment to the MEBA Trust (Exh. 26) was voted on, and delivered to the President of the Bridge Bank. A letter confirming this intention was also transmitted. (Exh. 27). These indicate a controversy as to whether the funds were to remain in the immediate trust.

10. Peter Bartholomew was the President and CEO of MCorp. He directly participated in all of the administrative activities pertaining to this suit, from his management position. On May 5, 1989, he wrote to James Gardner, his counter-part at Bridge Bank, with the intention of putting Bridge Bank on notice that no one could adopt any successor plans without approval of MCorp. (Exh. 27). His intent was to settle uncertainties regarding benefits issues. Certain actions were contemplated at the Bridge Bank that would effect Mcorp employees and former employees, particularly retirees who had retired prior to 1984, when

MCorp was created. It was his intent to safeguard their status with any successor trust. Similarly, he indicated that any funds continuing to be held in the MEBA Trust were not available to MCorp and that MCorp was denied access to such because they were held solely for the benefit of the trust beneficiaries.

11. On May 10, 1989, Bridge Bank gave notice that it wanted to withdraw from the MEBA Plan, and that it stood in the shoes of a "successor employer". (Exh. 32).

12. Mr. Bartholomew recalled seeing Bridge Bank's notice of its intent to withdraw from the MEBA trust (Exh. 32), but he did not consider it binding. He conceded that Bridge Bank asserted that they stood in separate shoes, but it is his position that the MCorp compensation committee and board had the right to approve any successor trust, and that regardless of their intent otherwise, any subsequent trusts were only successor trusts. Of particularly moment, he testified that Bridge Bank collected and retained money from former employees of MCorp, and therefore, he feels certain that the Bridge Bank trust took over as merely a successor trust.

13. Bridge Bank attempted to set up its own Plan, and related Trust agreement. However, for all intent and purposes, it adopted identical provisions, of the predecessor Plan and Trust. No Summary Plan Description or benefit selections were undertaken by the Bridge Bank, as would be required, unless the Bridge Bank is a successor interest. No Form 1024 was completed, as required by Section 501(c)(9). No recalculation was mandated, for Plan participants, with regard to accumulation of deductibles, again indicating clear intent of the establishment of merely a successor plan.

14. Critically, on May 10, 1989, written notice of Bridge Bank's withdrawal from the MEBA Trust was tendered to the MCorp's Benefits Committee. (Exh. 32). The intent of this letter was to allow Bridge Bank to exercise its right to become a successor trust. Thereafter, Bridge Bank never contributed to the trust, and never withdrew funds therefrom, although it has attempted to do so.

15. On June 5, 1989, as authorized on May 5, 1989, Bridge Bank established Defendant, the Deposit Insurance Bridge Bank Employees' Beneficiary Association Trust (the "Bridge Bank Trust"), for the purpose of acting as a funding medium for the Bridge Bank Welfare Plan. (PTO Adm 22).

16. The MCorp Cafeteria Plan provides the structure of the MEBA Welfare Plans. (Exh. 2). The Benefit plans offered under the Cafeteria Plan may be covered in separate plan documents, trust agreements, or administrative service contacts, all of which are adopted into the MCorp Cafeteria Plan by reference. *Id.* §§ 1.3; 5.1. Other plan documents, trust agreements or contracts for benefits are incorporated into the Cafeteria Plan, but in case of conflict with the terms of the Cafeteria Plan, the terms of the *other* plan documents control. *Id.* § 5.1.

17. Other plan documents include the MEBA Trust (Exh. 1), the July 1, 1984 Mercantile Texas Corporation Supplemental Health Care Plan, as amended into the MCorp Cafeteria Plan (Exh. 3), the July 1, 1984 Administrative Services Agreement between Prudential Mercantile Texas Corporation (Exh. 4), a Group Policy for accidental death and dismemberment (Exh. 5), a Group Policy for life insurance (Exh. 6), a Group Policy for dental care (Exh. 10),

the MEBA Trust Agreement (Exh. 1), and the January 1, 1989 Benefits Handbook, Summary Plan Description (Exh. 14).

18. Additionally, the MEBA Welfare Plan includes the MCorp Cafeteria Plan for Part-Time Employees, the MCorp Dependent Care Plan, and the MCorp Supplemental Health Care Plan. (*See* Exh. 29). Among other things, the Administrative Services Agreement and the Group Policy for life insurance explicitly cover retired and disabled employees and their beneficiaries. (Exh. 4 and 6).

19. The MEBA Welfare Plan (which includes the MCorp Cafeteria Plan by incorporation) provides coverage for "participants" of participating employers in the MEBA Welfare Plan. (Taylor Test). "Participants" include active employees, retired employees, disabled employees, and their beneficiaries. (PTO Adm 9).

20. Under the MEBA Welfare Plan, participating employers are liable to their participants to pay all benefits that are not funded or insured. (Exh. 2 § 10.3).

21. Prior to March 28, 1989, each Failed Bank was a participating employer in the MEBA Welfare Plan. (PTO Adm 19) The Failed Banks had a large population of participants, approximately 900 of whom retired or became disabled before March 28, 1989. (Exh. 77).

22. Stephanie Burks testified live, for several hours, in this trial. She is presently the Personnel Director for the City of Houston, and was formerly the Welfare Benefits Administrator for MCorp, at the time of the breakup of that Company. She designed and, at some point, administered all of the welfare benefits plans in controversy

in this cause. She was associated in a successor role with Bridge Bank/BANK ONE, for the period of March, 1989, through October, 1989.

Ms. Burks presented to the Court a remarkable profile in courage. In fact, upon the completion of her testimony, this Court was specifically moved to commend her action,s in a time of legitimate crisis, in the record of these proceedings. The Court indicated then, and reaffirms now its genuine admiration of her activities, on behalf of others. At a time when her Company was in a state of collapse and apparent disorganization, and when everyone else in the Company was attempting to distance themselves from the crisis at hand, Ms. Burks thought only of the some 7,000 employees of the MCorp, and the necessity of continuing their benefits and remuneration, rather than of her own self-interests, or those of her superiors. She "stepped up to the plate", in a remarkable fashion, bringing order to chaos, and ensuring, throughout the period of transition, as smooth and orderly a flow of benefits as possible to those in critical need. This Court is genuinely honored to have observed, through her testimony, her actions during this time. If ordinary citizens were entitled to the receipt of some sort of medal, for heroism in ordinary affairs, she would surely be a most worthy recipient.

23. At the same time, and notwithstanding this Court's enormous admiration of her actions *in extremis*, and notwithstanding her intentions at the time, it the sincere belief of the Court that her actions alone, and without proper supplemental steps being taken, could not properly establish a separate and independent trust for the benefit of the employees only of Bridge Bank/BANK ONE. Indeed, the overwhelming facts of this case, her heroic actions notwithstanding, indicate that Bridge Bank/BANK ONE's purported Trust was a successor only, and must accept both

the liabilities and assets of any predecessor trust. In this regard, the Court considers the critical divergence between the obligations of a successor trust, to assume the full liabilities of a predecessor trust, as mandated by E.R.I.S.A., and a legitimate need of the FDIC to fashion a new bank from the ashes of an old bank, and in the process, to curtail any more liabilities or obligations than are absolutely necessary to be undertaken, to maintain the integrity of such a successor institution. This Court firmly concedes Congressional intent, with regard to the need of the FDIC to be able to move with finality, in this regard. However, this Court feels more strongly that it should not be entitled to do so, at the abject expense of retirees and disabled persons, who spent their lives in the worthy cause of accruing interest in a plan which the FDIC contends can be evaporated with the stroke of a pen. These people paid a price, over the course of their lifetime, and have every reason to expect a return on their "investment". The plan beneficiaries' interests are paramount, and it is the intent of this Court to ensure that they are properly protected.

24. Ms. Burks was clearly operating under the MEBA Plan at the time of MCorp's collapse. In a moment of crisis, she indicted that she had a responsibility to ensure that "7,000 people were covered by some plan". In her view, Bridge Bank would be responsible for paying claims incurred after March 29, 1989, and the new plan would have the same provisions as the old. Her intent was that the employees would not see any "change", and it was her further intent that the plans were to be "mirror plans". In her mind, she intended a distinction between the two plans, with one being for the benefit of former employees and disabled persons, of MCorp, and the new plan pertaining solely to the employees of the Bridge Bank.

25. Ms. Burks did not perceive that the new plan required re-accumulation of medical deductibles, and lifetime benefit limits remained in effect. No re-enrollment in the Bridge Bank Plan was required. The Summary Plan Description, such as it existed for the successor plan, was to the be same for both plans. The essential provisions of the old plan continued in effect.

26. Remarkably, between March 28, 1989, and May 5, 1989, Ms. Burks conceded that there was no Bridge Banks Plan or Benefits Committee. Nevertheless, in a complete vacuum of authority, she understood her fiduciary obligations to administer "a plan", to ensure continued benefits for all concerned. Her courage in this regard, in the face of the real potential for accrual of possible personal liability, and the apparently complete absence of any guidance from her alleged superiors, is absolutely remarkable. (Exhs. 13, 27 and 32). Ms. Burks expressly noted that retired employees were not to be "cut out" of the "interim" plan. It was not her intent to deprive anyone of any benefits under "any plan". The status of retirees, disabled persons, and the like was never clarified, however; and she conceded that while she wanted them taken care of, "from day one, there arose a question of who owned them".

27. In her view, a separate plan was created, because Bridge Bank: created new plan documents; had a new sponsor; had a new pool of participants; wrote out a new trust agreement; had new attorneys; had new directors; had a new plan committee; had new contracts and resolutions; had new policies; and, had new trust accounts. However, of critical importance, the Court again notes that a number of critical things were similarly not undertaken, to properly distinguish the plans, as enumerated in Finding No. 13, above. (See also, Findings Nos. 30, 31, 32, 33, 34, 35, 36, 37, 38, and 42, herein.) Moreover, Steve Eschback, an

actuary, who testified on behalf of Plaintiff stated unequivocally that only a successor trust can take the money out of an existing trust, and that it is impossible to take assets from a predecessor trust selectively. A successor trust must accept both assets and liabilities. (Emphasis added.)

Therefore, in his view, a successor trust cannot take responsibility solely for current employees. It absolutely must accept full responsibility for retired employees, disabled employees, and the like. Indeed, in his view, if the Bridge Bank Trust wanted to retain its VEBA status, it would have had to take the retirees of the predecessor trust with it. He readily conceded that a subsequent employer could set up a new trust, but that it cannot take funds from the predecessor trust without incurring liability for former employees or retirees.

28. Philip Kenny was called as a witness by BANK ONE. He is that Company's Personnel Manager. In the relevant time frame, he was Stephanie Burks' boss, although he conceded virtually no relevant knowledge, and no meaningful input into this controversy. Of significance, however, he noted that during the transition phase and the existence of Bridge Bank, all benefits decisions were made by the FDIC. He resigned from the Benefits Committee of that bank, because of FDIC intervention, and his apprehension regarding personal liability.

29. Jonathan Schreve was also called by Defendant, as an expert actuary. He is a remarkably bright individual, having a Bachelor of Science in mathematics, a number of academic honors, and membership in Phi Beta Kappa. He is a member of the American Academy of Actuaries, and is an impressive and completely credible witness.

Of critical significance, Mr. Schreve conceded that if BANK ONE wanted to set up a new trust, it should have properly sued the old trust for any funds it thought it would be entitled to, if it wanted to maintain a completely separate status. In his view, this was clearly the "cleanest way to do it". He conceded that a declaration by Bridge Bank merely that it intended to act as a "successor" created substantial ambiguity. He stated that the assumption of obligations of former employees was not what Bridge Bank wanted to do, "although it may be what it did", in his view.

30. After March 28, 1989, the Bridge Bank proceeded as if it were a participating employer under the MEBA Welfare Plan that later became a participating employer in a successor welfare plan to the MEBA Welfare Plan.

31. The Bridge Bank did not require the Bridge Bank employees to fill out new enrollment forms to participate in a new welfare benefits plan.

32. The Bridge Bank did not file a new Form 1024 notice and application to the Internal Revenue Service to qualify the Bridge Bank Plan as tax deductible under Section 501(c)(9) of the Internal Revenue Code. (Bridge Bank has not produced, or offered any other explanation for the absence of a new Form 1024 notice and application to the IRS.) (Taylor Trust).

33. The Bridge Bank did not require its employees who had accumulated deductibles under the MEBA Welfare Plan to re-accumulate deductibles under the Bridge Bank Welfare Plan.

34. The Bridge Bank did not reinstate lifetime medical benefits limits under the Bridge Bank Welfare Plan

for employees who had submitted medical claims under the MEBA Welfare Plan.

35. The Bridge Bank used the same "price tags" set for benefits and participation in the Bridge Bank Plan as were used in the MEBA Welfare Plan. (Burks Test).

36. Bridge Bank was obligated to provide a summary plan description to all its participants. (Exh. 110 at DEF 32134). The only summary plan description which Bridge Bank could have used to describe benefits provided to its eligible participants was the MCorp Summary Plan Description. (Exh. 14). The Bridge Bank did not prepare a new summary plan description for the Bridge Bank Welfare Plan. (Burks Test). (Bridge Bank has not produced or offered any other explanation for the absence of a new summary plan description for the Bridge Bank Welfare Plan.)

37. The Bridge Bank collected premiums from Failed Bank participants who retired before March 28, 1989. (PTO Adm 34). (On August 22, 1989 the Bridge Bank entered into an administrative services agreement contractually permitting collection of retiree premiums for MCorp, but the Bridge Bank would not turn the retiree premiums over to MCorp.)

38. On or before May 5, 1989, and continuing until this litigation commenced, Bridge Bank claimed to be a participating employer in the MEBA Welfare Plan as a successor to the Failed Banks and to have established a welfare plan and a trust that were successors to the MEBA Welfare Plan and MEBA Trust.

39. On May 5, 1989, the Bridge Bank Board of Directors met and discussed the topic of employee benefit plans at length (Exh. 28):

> Employee benefit plans were the next topic of discussion. Lawrence Merrigan noted that much had been discussed at the Board members lunch concerning benefit plans and that the Board understood the need to maintain employee benefits. Mr. Twomey commented that it was clearly to Bridge Bank's benefit to adopt the MCorp pension plan as its own in order to preserve any rights it might have to the excess in the benefit plan funds. Mr. Twomey directed the Board to Page 4 of the paper entitled "Pension Plans and Welfare Benefit Plants." Mr. Twomey stressed the basic nature of the benefit plans being put before the Board. Mr. Twomey added that one benefit of adopting the benefit plan for the Bridge Bank would be that a purchaser would not have to deal with MCorp, but only with the Bank. Upon motion of Quinton Thompson, seconded by Lawrence Merrigan, the Board unanimously approved the benefit plan presented with the proviso that the FDIC was welcome to comment on the plans. (The resolution regarding the benefit plans is contained in the permanent Board files and made a part of these minutes as if fully set forth herein.)

40. The resolutions adopted by the Board explicitly state that the Failed Banks were each "participating employers" in the MEBA Welfare Plan; that a "participating employer" may withdraw from the MEBA Welfare Plan; that Bridge Bank should withdraw from the MEBA Welfare Plan and establish its own welfare plans as "successor plans" to the MEBA Welfare Plans, thurs providing a continuation of benefits with no gap or lapse in coverage; that Section 11.02

of the MEBA Trust permits a successor to a participating employer to establish a separate trust for continuation of benefits; and that Bridge Bank should adopt its own trust as a "successor trust" to the MEBA Trust. (Exh. 29).

41. The Board's action on May 5, 1989 was presented to the Federal Deposit Insurance Corporation for review, and on May 17, 1989, the Bridge Bank board reviewed and approved the minutes of the May 5, 1989 special meeting. (Exh. 38). The May 5, 1989 Bridge Bank resolutions were never rescinded, amended or even criticized by BANK ONE or by the FDIC. (Bardner and Burks Test).

42. Pursuant to the May 5, 1989 resolutions, the Bridge Bank established the Bridge Bank Cafeteria Plan as a successor plan. The Bridge Bank Plan stated that "Bridge Bank has continued as a participating employer in the MCorp Plan since its inception of March 28, 1989, as successor to various national banking associations which were previously participating employers in the MCorp Plan. (Exh. 30). Bridge Bank never amended the Bridge Bank Cafeteria Plan to provide that it was not a successor plan or to delete its recitals that the Bridge Bank, since March 28, 1989, had been a participating employer in the MEBA Welfare Plan. Nor did Bridge Bank ever notify the retired and disabled employees of the Failed Banks that were not covered under the Bridge Bank Welfare Plan. (Burks Test).

43. On May 10, 1989, Bridge Bank gave notice that, in accordance with Section 11.02 of the [MEBA Trust] Agreement ("MCorp VEBA") [Bridge Bank], as successor employer to the [Failed Banks], has elected to establish a separate trust agreement for the continuation of benefits for its employees and Bridge Bank hereby request that the trust

assets held in the MCorp VEBA on behalf of the active employees of Bridge Bank be transferred to MTrust Corp., N.A., as Trustee" of the Bridge Bank VEBA. (Exh. 32).

44. On May 10, 1989, the Bridge Bank gave thirty days advance notice of withdrawal and requested waiver of the thirty day notice requirement. (Exh. 32 at p. 1). On June 5, 1989, the Bridge Bank Trust Agreement was executed. That document provides that Bridge Bank "has continued as a participating employer in the MCorp Plan since its inception on March 28, 1989, and that "[e]ffective as of the date of withdrawal from the MCorp Plan by Bridge Bank...all benefits...under the MCorp Plans are continued under the [Bridge Bank] Plans...." (Exh. 48 at p.1).

45. Bridge Bank's withdrawal from the MEBA Welfare Plan was not initiated until May 5, 1989, was not the subject of written notice until May 10, 1989, and without waiver of the thirty day notice requirement, could not have been effective until June 9, 1989. There is no evidence of any such waiver.

46. On May 5, 1989, the Compensation Committee of MCorp met at 7:00 a.m. at a specially called telephone meeting. (Taylor and Bartholow Test). At that time, the Compensation Committee attempted to adopt an amendment to the MEBA Trust. (Exh. 26).

47. The attempted amendment was not done in the ordinary course of business and was not done with the approval of the bankruptcy court. The amendment was attempted to protect the retired and disabled employees of the Failed Banks.

48. Before litigation of this civil action, Bridge Bank refused to acknowledge that the May 5, 1989

Amendment to § 11.02 of the MEBA Trust was legally binding. Bridge Bank consistently and repeatedly asserted that Bridge Bank was a successor employer and established the Bridge Bank Welfare Plan and Bridge Bank Trust as successors to the MEBA Welfare Plan and MEBA Trust. (Exh. 28, 30, 32, 48 and 75), Bridge Bank's position was that the May 5, 1989 amendment was not binding on Bridge Bank. (Burks Test).

49. There is no sufficient evidence that Bridge Bank relied on MCorp's attempted amendment, or changed its position or was harmed in any manner by the attempted amendment. Even after the attempted amendment, both Bridge Bank and MCorp interpreted the MEBA Welfare Plan documents, including Section 11.02 of the MEBA Trust, to qualify Bridge Bank as a successor of the Failed Banks with the legal power to establish a successor trust to the MEBA Trust. (Exh. 47).

50. From May 10, 1989 until this civil action was commenced, BANK ONE, the Bridge Bank Welfare Plan and the Bridge Bank Trust claimed and attempted to recover funds out of the MEBA Trust. (Exh. 60, 63, 74 and 75).

51. On September 8 and 9, 1989, BANK ONE and the FDIC filed proofs of claim that included "a claim believed to be not less than $1,500,000" in connection with the MEBA Welfare Plan. (Exh. 74 and 75; see also Exh. 60 and 63).

52. Bridge Bank also held some $693,318.54 in assets of the MEBA Welfare Plan (Exh. 51). That money and later money collected by Bridge Bank directly from the Failed Banks' retirees was held by Bridge Bank "in a segregated account solely for the benefit of [Bridge Bank] employees." (Exh. 53 at p 2).

53. By May 11, 1989, Bridge Bank recognized that the $693,318.54 check delivered to Kevin Twomey of Bridge Bank by Tom Sieling of MTrust was for March contributions to the MEBA Welfare Plan. (Exh. 33).

54. An exchange of correspondence transpired between the companies, on June 16, 1989, (Exh. 53), and June 23, 1989 (Exh. 61), seeking an exchange of $693,318.00. In Mr. Taylor's view, if Bridge Bank was attempting to contribute funds, it was clear to him that the BANK ONE trust was attempting to act as a successor trust. However, Bridge Bank's view was that the funds were to be retained in a segregated account, solely for the use of Bridge Bank employees. However, this is untenable. Such a segregation of funds was never authorized by MCorp (Exh. 61 p. 3). Moreover, Bridge Bank continued accepting Plan contributions from retired MCorp employees. Therefore, it was clearly acting as a successor interest, whether it wanted to accept all of the liabilities, of the predecessor trust, or not.

55. Although Stephanie Burks recommended that the money be returned to the MEBA (Exh. 33), the funds were retained on instructions of the FDIC. (Kenny Test; see also Exhibits 55 and 59).

56. On August 22, 1989, Bridge Bank and MCorp entered into an Administrative Services Agreement under which Bridge Bank provided administrative services for MCorp and among other things collected group plan medical payments from retired and disabled employees of the Failed Banks. (Exh. 72). BANK ONE collected over $220,000.00 from the retirees and disabled employees of the Failed Banks. However, BANK ONE did not pay these funds over to the MEBA Welfare Plan until after this litigation commenced.

57. The result of this Agreement was that through December, 1989, Bridge Bank and later BANK ONE actually continued to deal with the MEBA trust problems, benefits and employee contributions. This was despite the alleged separation of the two plans. Consequently, it again appears clear to the Court that regardless of any intention on the part of Bridge Bank to create a completely separate and distinguishable plan, the proper requisite acts were never undertaken to completely set the successor plan up as a separate and distinct entity, (See Finding No. 13), and therefore, it is the Court's perception that it acted and could only act as a successor plan.

58. On June 16, 1989, the entire Bridge Bank Benefits Committee resigned. (Exh. 54). The FDIC had become involved to control the resolution of these disputes [over return of the assets held in the MEBA Welfare Plan]. (Exh. 55 and 59; see also Exh. 81 at pp 80-81).

59. BANK ONE and the FDIC entered into a "Benefit Plan Litigation Agreement". (Exh. 84). That agreement deals with "claims made with respect to amounts held in trust under...the Mercantile Employees' Beneficiary Association (the "VEBA")..."the proofs of claim filed by BANK ONE and the FDIC. (*Id.* at pp 1-2). The agreement provides (*Id.* at p 3 emphasis supplied):

> *The FDIC will get the benefit of any recovery on the VEBA claim* ..., but the method, manner, and amount of providing the FDIC with such benefit shall be agreed to by the parties at a later date.

60. The MEBA Welfare Plan funds were retained to influence payment of the claims asserted against the MEBA Welfare Plan and MEBA Trust. (Exh. 53).

61. In December, 1990, after this litigation was commenced, BANK ONE returned almost all of the funds withheld by a check for $1,018,183.04. (Exh. 92). BANK ONE did not pay the remaining funds (approximately $23,000.00) until November 1, 1991.

62. The June 7, 1989 Minutes of the Fist Meeting of the Executive Committee of Bridge Bank imply that Bridge Bank believed either that Bridge Bank's adoption of the MEBA Welfare Plan or the terms of the Purchase and Assumption Agreements gave Bridge Bank the right to participate in the MEBA Welfare Plan and MEBA Trust. (Exh. 49).

63. The Purchase and Assumption Agreements entered into between the FDIC as Receiver and the Bridge Bank provide an additional and distinct basis for Bridge Bank's liability to the Failed Banks' retired and disabled employees. (Exh. 16, §§ 2.1(b), 4.7(a)).

64. The supervisory officers and employees of the Bridge Bank who implemented and designed the Bridge Bank Welfare Plan and Bridge Bank Trust were former supervisory officers and employees of MCorp Management and the Failed Banks who were familiar with the terms of the MEBA Welfare Plan. (Taylor, Kenny and Burks Test).

65. Bridge Bank communicated to MCorp, to the MCorp Benefits Committees and to Bridge Bank's employees that there would be no gap or lapse in coverage and that the Bridge Bank Welfare Plan was virtually identical to the MEBA Welfare Plan. (Exh. 21, 29, 30 and 37). This was done to ensure that employees remained with Bridge Bank and that their morale was good. (Burks Test and Exh. 25 and 28). Had Bridge Bank communicated to its employees

that there would be no coverage for retired and disabled employees of the Failed Banks it likely would have had an adverse impact on employee morale.

66. Participants in the MEBA Welfare Plan include retired and disabled employees of the Failed Banks and their beneficiaries. (Findings 11-12 above) The MCorp summary Plan Description must have been used by the Bridge Bank. (Finding 21 above) The MCorp summary Plan Description provides retirees are eligible to receive health and life insurance benefits. (Exh. 14, at pp 1 and 17). The early written communications made by Bridge Bank gave no indication that Bridge Bank would not provide retiree benefits. (Exh. 21 and 37).

67. Pursuant to Section 8.4(a) of the Bridge Bank Plan, the Bridge Bank Benefits Committee expressly reserved to itself the duties and powers "[t]o construe and interpret the Plan, and decide all questions of eligibility." (Exh. 30).

68. There is no sufficient evidence that the Bridge Bank Benefits Committee ever delegated any authority to Plan Administrator Stephanie Burks to determine the eligible participants under the Bridge Bank Plan. Stephanie Burks did testify that in her own opinion retirees and disabled employees of the Failed Banks were not covered by the Bridge Bank Plan and that she believed MCorp, as the sponsor of the MEBA Welfare Plan, was liable to the retirees and disabled employees of the Failed Banks. However, she testified she had made no formal or written decision as Plan Administrator to deny coverage to the Failed Banks' retirees and disabled employees and that, while she was employed by Bridge Bank, she believed that decision was not hers to make.

69. There is no sufficient evidence that a determination to exclude participants who retired or became disabled before March 28, 1989, was ever made by the Bridge Bank Benefits Committee or by the Bridge Bank Board of Directors.

70. Furthermore, by claiming that Bridge Bank was a participating employer in the MEBA Welfare Plan and representing that its coverage for employees was virtually identical to the MEBA Welfare Plan coverage, Bridge Bank is estopped from now claiming that its coverage is limited to its active employees.

71. The Court concludes that on or before May 10, 1989 Bridge Bank became a participating employer under the MEBA Welfare Plan and assumed the duties and responsibilities of the MEBA Welfare Plan as a successor to the Failed Banks.

72. The Court concludes that by becoming a participating employer in the MEBA welfare Plan, Bridge Bank, as well as the Bridge Bank Welfare Plan and the Bridge Bank Trust, assumed the responsibilities of the Failed Banks to their retired and disabled employees.

73. Furthermore, the Court concludes that Bridge Bank is estopped to deny that it became a participating employer in the MEBA Welfare Plan and a successor to the Failed Banks with respect to the MEBA Welfare Plan because of its conduct, its claims to be a participating employer in the MEBA Welfare Plan and a successor to the Failed Banks, and its claims and attempts to recover funds out of the MEBA Trust.

74. Section 11.01 of the MEBA Trust provides that, upon dissolution or liquidation of any participating

employer, the trust funds respecting that employer shall be paid out in the form of distributions to the participants unless a successor to the participating employer shall "elect to continue the Plan" or establish a successor plan and a successor trust. (Exh. 1).

75. The Bridge Bank's repeated claims that it is a successor to the Failed Banks and that it has established the Bridge Bank Welfare Plan and the Bridge Bank Trust as successors to the MEBA Welfare Plan and MEBA Trust prevented payment of the trust funds directly to the participants of the Failed Banks and their beneficiaries. The Bridge Bank's denial that the Bridge Bank the Bridge Bank Welfare Plan or the Bridge Bank Trust were responsible for welfare benefits for retired and disabled employees covered by the MEBA Welfare Plan prevented the transfer of the trust funds to the Bridge Bank Trust. The Bridge Bank's inconsistent positions presented the dilemma that resulted in this litigation. (Taylor Test).

76. Under the MEBA Welfare Plan, participating employers are obligated to provide benefits to all of their participants, including retired and disabled employees. Participating employers may withdraw with respect to all of their participants, but they may not withdraw only with respect to their active employees. (Eschbach Test; Exh 2, § 10.4).

77. The Committee and the MEBA Trust heretofore have continued benefits to the Failed Banks' previous participants who retired or became disabled before March 28, 1989 out of MEBA Trust funds contributed by the Failed Banks and their previous employees.

78. Funds held by the MEBA Trust allocable to the Failed Banks are presently nearing exhaustion because

numerous claims have been paid under the MEBA Welfare Plan for previous participating employees of the Failed Banks and their beneficiaries. (Taylor Test).

79. Since March 28, 1989 Bridge Bank and BANK ONE have failed to pay any money to satisfy their obligations respecting employees of the Failed Banks who retired or became disabled before March 28, 1989. (Exh. 100).

80. Plaintiff Taylor, as administrator of the MEBA Welfare Plan, has maintained records that allocate the MEBA Trust Funds as among eligible participants of the Failed Banks and eligible participants of MEBA Welfare Plan employers other than the Failed Banks thus show which funds are transferable to the Bridge Bank Trust and which are not. (Exh. 100). Such allocations were not arbitrarily or capriciously made and were not an abuse of discretion. The Court approves such allocations and the methodology used by the MEBA Welfare Plan Administrator to make them.

CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because this civil action arises under the laws of the United States, specifically including the Employee Retirement Income Security Act of 1974, as amended (E.R.I.S.A.) 29 U.S.C. § 1132. All parties have been served and have appeared without contesting *in personam* jurisdiction. Rule 12(h)(1), F. R. Civ. P.

2. All necessary parties have been joined. Rules 12(b)(7), 12(h)(2), and 19(a), (b), F. R. Civ. P. *See, Provident Tradesmens Bank & Trust Co. v. Patterson*, 390

U.S. 102, 110 (1968) and *Ilan-Gat Engineers, ltd. v. Antigua Int'l Bank*, 659 F.2d 234, 241 (D.C. Cir. 1981).

3. Every bridge bank has all corporate powers of a national bank and is subject to the same provisions of law as a national bank. 12 U.S.C. § 1821(n)(4). *See also Federal Deposit Insurance Company v. State Bank of Virden*, 893 F.2d 129 (7th Cir. 1990). Bridge Bank had the power to elect and was qualified to become a successor participating employer in the MEBA Welfare Plan.

4. E.R.I.S.A. preempts state law. *Lee v. E. I. DuPont de Nemours & Co.*, 894 F.2d 755, 756 (5th Cir. 1990). As a comprehensive statute designed to protect employee benefits, E.R.I.S.A. is to be liberally construed in favor of participants. *See*, *Kross v. Western Electric Co.*, 701 F.2d 1238 (7th Cir. 1983). In light of the statute's remedial purposes, coverage should be extended to provide the maximum degree of protection to employees. *See*, *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *affirmed*, 446 U.S. 359 (1980); *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978); *Connolly v. Pension Benefit Guaranty Corp.*, 581 F.2d 729, 732 (9th Cir. 1978), *cert. denied*, 440 U. S. 935 (1979).

5. In enacting the Federal Deposit Insurance Act, 12 U.S.C. § 1811 et seq., Congress empowered the FDIC to act with finality in many instances. After considering the language, legislative history, and structure and purpose of E.R.I.S.A. and the Federal Deposit Insurance Act, the Court is convinced that Congress did not intend to allow the FDIC to unilaterally decide to terminate the benefits of employees covered by an E.R.I.S.A. plan.

6. In enacting E.R.I.S.A., it was the intent of Congress to make applicable the law of trusts in view of the

special nature and purpose of employee benefit plans. *See, e.g., Freund v. Marshall & Ilsey Bank* 485 F. Supp. 629, 635 (W.D. Wis. 1979); and *Marshall v. Teamsters Local 282 Pension Trust Fund*, 458 F. Supp. 986 990 (E.D.N.Y. 1978). A fiduciary is duty-bound to inform its beneficiaries of important matters concerning the trust. Bogert, *Trusts and Trustees*, 2nd Ed. Rev'd § 961. This duty to supply information is codified in E.R.I.S.A., 29 U.S.C. §§ 1021 and 1024.

7. Participants are entitled to notice of material modifications in the plan. *See, Baker v. Lukens Steel Co.*, 793 F.2d 509 (3rd Cir. 1986). Under the unique circumstances of this case, it was misleading for Bridge Bank widely to disseminate information that it was continuing the MCorp welfare benefit package without change if it did not in fact intend to provide coverage for a significant group of persons in fact covered by the MCorp welfare benefit package, those who had retired or become disabled before March 28, 1989. Bridge Bank was required to provide affirmative notice of the change if Bridge Bank intended to effectuate the change.

8. Once employee status is determined, an individual remains qualified as a member of a welfare plan even if on leave of absence, or working temporarily for another employer, acting as an independent contractor, terminated due to layoff, retirement or disability. Treas. Reg. 501(c)(9)-2b. Both the MEBA Welfare Plan and the Bridge Bank Welfare Plan provide coverage to former disabled employees. The terms "employee" or "employed by the company" are ambiguous and have been held to include service for the predecessor of the employer. *See, Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980).

9. No determination was made under the Bridge Bank Welfare Plan, by the Bridge Bank Board, Benefits Committee, or Plan Administrator, to deny coverage to retired or disabled employees of the Failed Banks. Alternatively, any such determination by the Plan Administrator is set aside as arbitrary and capricious because predicated on the assumption that MCorp was liable as plan sponsor to such persons. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989).

10. E.R.I.S.A. requires that all participants of an E.R.I.S.A. plan be provided with an accurate description of their benefits in a summary plan description. E.R.I.S.A. Section 102, 29 U.S.C. § 1022. Regarding a *new* plan, participants must be provided with the summary plan description within 120 days of the effective date of the plan. 29 CFR 2520.104b-(2)(a).

> Any burden of uncertainty created by careless or inaccurate drafting of the summary must be placed on those who do the drafting, and who are most able to bear that burden, and not on the individual employee, who is powerless to affect the drafting of the summary or the policy and ill equipped to bear the financial hardship that might result from a misleading or confusing document.
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Hansen v. Continental Insurance Co., 940 F.2d 971, 982 (5th Cir. 1991). An employer will be bound to the terms of its E.R.I.S.A. plan and held to its representations regarding the plan. *See, e.g., Monson v. Century Manufacturing Co.*, 739 F.2d 1293, 1302-1303 (8th Cir. 1984).

11. The MEBA Welfare Plan and the MEBA Trust contain bilateral obligations that are binding on Bridge Bank.

See, Howell v. Continental Credit Corp., 655 F.2d 743 (7th Cir. 1981); *Federal Deposit Insurance Corp. v. McClanahan*, 795 F.2d 512, 515 (5th Cir. 1986). By electing to become a participating employer in the MEBA Welfare Plan as a successor to the Failed Banks, Bridge Bank assumed the duties and responsibilities under the MEBA Welfare Plan and MEBA Trust to the participants of the Failed Banks, including their employees who had retired or became disabled before March 28, 1989.

12. A participating employer in a welfare benefit plan may not breach its terms not interpret the plan in an arbitrary or capricious manner. *See, e.g.* E.R.I.S.A. § 404, 29 U.S.C. § 1104; *Policy v. Powell Pressed Steel Co.*, 770 F.2d 609 (6th Cir. 1985), *cert. denied* 475 U.S. 1017 (1986); *International Union, United Automobile Workers of America v. Cadillac Malleable Iron Co.*, 728 F.2d 807 (6th Cir. 1984); *International Union, United Automobile Workers of America v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984).

13. Principles of successorship liability apply in E.R.I.S.A. cases as well as in labor relation cases, Title VII cases, and Sec. 1981 cases. *Upholsterers Un. Pen. Fund. v. Artistic Furniture*, 920 F.2d 1323, 1327 (7th Cir. 1990). Bridge Bank is a "successor employer" to the Failed Banks respecting the MEBA Welfare Plan. *See, Equal Employment Opportunity Commission v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974). *See also Golden State Bottling Co. v. National Labor Relations Board*, 414 U.S. 168 (1973); *Musikiwamba v. Essi, Inc.*, 760 F.2d 740 (7th Cir. 1985); *Bates v. Pacific Maritime Association*, 744 F.2d 705 (9th Cir. 1984); *Trujillo v. Longhorn Manufacturing Co.*, 694 F.2d 221 (10th Cir. 1982).

14. A successor who assumes or adopts a welfare benefits contract is bound by it. *National Labor Relations Board v. Pine Valley Division of Ethan Allen, Inc.*, 544 F.2d 742 (4th Cir. 1976). *See also New England Mechanical, Inc. v. Laborers Local Union 294*, 909 F.2d 1339 (9th Cir. 1990); *Audit Services, Inc. v. Rolfson*, 641 F.2d 757 (9th Cir. 1981); *Cement Masons' Pension Trust Fund v. O'Reilly*, 664 F. Supp. 277 (E.D. Mich. 1987). As a successor employer, Bridge Bank, together with the Bridge Bank Welfare Plan and Bridge Bank Trust, is responsible for the welfare benefits promised by the Failed Banks. *United Steelworkers of America v. Connors Steel Co.*, 855 F.2d 1299 (11th Cir. 1988). *cert. denied*, 489 U.S. 1096 (1989). Bridge Bank has adopted and assumed the duties and responsibilities under the MEBA Welfare Plan and became and remains responsible to all participants of the Failed Banks, including those who retired or became disabled before March 28, 1989, and their beneficiaries.

15. E.R.I.S.A. makes it unlawful for an employer to discriminate against any participant or beneficiary for the purpose of interfering with the attainment of any right to which a participant may become entitled under the plan. 29 U.S.C. § 1140. *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3rd Cir.), *cert. denied*, 484 U.S. 979 (1987); *Kross v. Western Electric Co.*, 701 F.2d 1238 (7th Cir. 1983); *McLendon v. Continental Group, Inc.*, 602 F. Supp. 1492, 1499 (D.N.J. 1985). Bridge Bank's denial of coverage, and attempted denial of trust funds, for the benefit of retired and disabled employees of the Failed Banks contravenes the anti-discrimination provision of E.R.I.S.A..

16. Additionally, Bridge Bank's retention of the $693,318.54 and the $226,767.60 in funds made Bridge Bank a fiduciary and a party in interest with respect to the MEBA

Trust and the MEBA Welfare Plan under Sections 3(14)(A) and (C) and 3(21) of E.R.I.S.A..

17. The Benefit Plan Litigation Agreement purported to give the FDIC the benefit of any recovery against the MEBA Trust. Performance of that Agreement would have violated the strict prohibition against the use of a VEBA's assets to benefit anyone other than the plan's participants and beneficiaries. 29 U.S.C. § 1106. *See also Sandoval v. Simmons*, 622 F.Supp 1174 (C.D. Ill. 1985).

18. Principles of equitable estoppel apply to claims under E.R.I.S.A.. *See*, *Black v. TIC Investment Corp.*, 900 F.2d 112, 114 (7th Cir. 1990); *Dockray v. Phelps Dodge Corp.*, 801 F.2d 1149, 1155 (9th cir. 1986). *See also Hermann Hospital v. Meba Medical & Benefits Plan*, 845 F.2d 1286 (5th Cir. 1988) (remanding to determine whether the facts raised an estoppel of a health benefits plan).

19. Under the facts of this case, Bridge Bank is estopped to deny that it became a participating employer under the MEBA Welfare Plan, is estopped to deny that the Bridge Bank Welfare Plan is a successor plan to the MEBA Welfare Plan, is estopped to deny that the Bridge Bank Welfare Plan is a successor plan to the MEBA Welfare Plan, is estopped to deny that the Bridge Bank Trust is a successor trust to that MEBA Welfare trust, and is estopped to deny responsibility for Failed Bank participants who retired or became disabled before March 28, 1989. *See*, *e.g.*, *Neiman-Marcus Group, Inc. v. Dworkin*, 919 F.2d 368 (5th Cir. 1990); *Keado v. U.S.*, 853 F.2d 1209 (5th Cir. 1988) and *FDIC v. Harrison*, 735 F.2d 408, 411 (11th Cir. 1984).

20. MCorp's attempted May 5, 1989 Amendment to the MEBA Welfare Plan was outside the ordinary course of its business and could not have been effected without a

bankruptcy court order granting relief after notice and an opportunity for a hearing. 11 U.S.C. § 363(b)(1); *In re James Phillips, Inc.*, 29 Bankr. 391 (S.D.N.Y. 1983); *In re Waterfront Companies, Inc.*, 56 Bankr. 31 (Bankr. D. Minn. 1985).

21. The abuse of discretion standard of review is appropriate for the factual findings made by the MEBA Welfare Plan Administrator on the proper allocation of MEBA Trust assets between participants of the MCorp entities and participants of the Bridge Bank. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989); *Pierre V. Connecticut General Life Insurance Co.*, 932 F.2d 1552 (5th Cir.), *cert. denied*, 60 U.S.L.W. 3267 (Nov. 18, 1991).

22. The MEBA Welfare Plan Administrator did not abuse his discretion in allocating the remaining assets of the MEBA Welfare Plan and the MEBA Trust between participants of the MCorp entities and the Bridge Bank participants. *Bachelor v. International Brotherhood of Electrical Workers Local 861*, 877 F.2d 441, 444 and n. 10 (5th Cir. 1989).

23. An award of attorney's fees under E.R.I.S.A. is discretionary. Given E.R.I.S.A.'s remedial purpose of protection of employee rights, a plaintiff succeeding on any significant issue should be entitled to an award of attorney's fees. *See*, *Smith v. CMTA-IAM Trust*, 746 F.2d 587, 589 (9th Cir. 1984). In *Iron workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980), the court delineated several factors determining whether attorney's fees should be awarded to prevailing parties. Those factors are satisfied in the present case.

24. The court will enter a Final Judgment in this civil action, but will retain jurisdiction to determine

attorney's fees. In determining the amount of attorney's fees, the Court will be guided by the factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974). Plaintiffs are directed to submit a detailed affidavit with supporting documentation in accordance with the *Johnson* factors within fifteen (15) days of the signing of the Judgment. The BANK ONE Defendants will have ten (10) days thereafter to file any controverting material.

25. Matters relating to control and supervision of trusts are within the equity jurisdiction of the Court. *In re A. A. Robins Co.*, 880 F.2d 769 (4th Cir. 1989). The Court will also retain jurisdiction over the welfare benefit plans and trusts to ensure that the participants and beneficiaries of these trusts are protected.

26. The Court determines that there is no just reason for delay and expressly directs entry of Final Judgment herein. Rule 54(b), F. R. Civ. P.

SIGNED this the 15th day of January, 1992, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

APPENDIX J

JAN 15 1992
(illegible)
By Deputy /s/ N Ruhaak

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JIMMY F. TAYLOR, as the Administrative Committee, and for and on behalf of the WELFARE PLAN OF MERCANTILE EMPLOYEES' BENEFICIARY ASSOCIATION, and AMERITRUST TEXAS, N.A., TRUSTEE OF Mercantile Employees' Beneficiary Association Trust	§	
Plaintiffs	§	C.A. NO.
VS.	§	H-90-3815
BANK ONE, TEXAS, N.A., the DEPOSIT INSURANCE BRIDGE BANK EMPLOYEES' BENEFICIARY ASSOCIATION TRUST, the WELFARE PLAN OF BANK ONE, TEXAS, EMPLOYEES' BENEFICIARY ASSOCIATION, BANC ONE MORTGAGE COMPANY OF TEXAS f/k/a MBANK MORTGAGE MCORP, MCORP FINANCIAL, and MCORP MANAGEMENT	§	
Defendants	§	

FINAL JUDGMENT, DECLARATORY JUDGMENT AND DECREE
INSTRUCTING TRUSTEE AND ADMINISTRATOR

This civil action was tried to the Court November 13, 14, and 15, 1991, on the Second Amended Complaint of Plaintiff Jimmy F. Taylor as the Administrative Committee (together with his successors, the "Committee"), and for and on behalf of the WELFARE PLAN OF MERCANTILE EMPLOYEE'S BENEFICIARY ASSOCIATION (the "MEBA Welfare Plan"), and Plaintiff AMERITRUST TEXAS, N.A., TRUSTEE of Mercantile Employees' Beneficiary Association Trust (the "MEBA Trust"). The Defendant BANK ONE, TEXAS, NA.A., formerly known as Deposit Insurance Bridge, National Association ("Bank One"), the Defendant DEPOSIT INSURANCE BRIDGE BANK EMPLOYEE'S BENEFICIARY TRUST (the "Bridge Bank Trust"), the Defendant WELFARE PLAN OF BANK ONE, TEXAS, EMPLOYEES' BENEFICIARY ASSOCIATION (The Bridge Bank Plan"), and the Defendant BANC ONE MORTGAGE COMPANY, TEXAS, formerly known as MBank Mortgage ("Banc One Mortgage") went to trial on their First Amended Answer. The Defendants MCORP, MCORP FINANCIAL, and MCORP MANAGEMENT together went to trial on their Answer. A Revised Pre-trial Order agreed to by the parties was submitted on November 5, 1991. The parties stipulated to dismissal of counts two and three of the Second Amended Complaint. There are no counterclaims or crossactions. The Court has separately made Findings of Fact and Conclusions of Law.

It is ORDERED.

(1) Effective March 28, 1989, Bank One became a participating employer under the terms of the welfare plan

documents comprising the MEBA Welfare Plan and as such Bank One became and remains liable to the former employees (and their beneficiaries) of the hereinafter defined Failed Banks who retired or became disabled before March 28, 1989 (the "Subject Participants"). The "Failed Banks" are MBank Abilene, N.A., MBank Corsicana, N.A., MBank Dallas, N.A., MBank Marshall, N.A., MBank Mid Cities, N.A., MBank Wichita Falls, N.A., MBank Houston, N.A., MBank The Woodlands, N.A., MBank Denton County, N.A., MBank Orange, N.A., MBank Sherman, N.A., MBank Alamo, N.A., MBank Austin, N.A., MBank Brenham, N.A., MBank Odessa, N.A., MBank Round Rock, N.A., MBank Greenville, N.A., MBank Longview, N.A., MBank Fort Worth, N.A., and MBank Jefferson County, N.A. and their predecessors.

(2) The Bridge Bank Plan is a successor plan to the MEBA Welfare Plan respecting the Subject Participants and all employees of the Failed Banks who later became employed by Bank One, and as such the Bridge Bank Plan became and remains liable to the Subject Participants.

(3) The Bridge Bank Trust is a successor trust to the MEBA Trust respecting the Subject Participants and all employees of the Failed Banks who later became employed by Bank One, and as such the Bridge Bank trust became and remains liable to the Subject Participants.

(4) The Subject Participants have the same rights to receive benefits from Bank One, the Bridge Bank Plan, and the Bridge Bank Trust, as any employees of Bank One who were covered by the MEBA Welfare Plan or the Bridge Bank Plan and who retired or became disabled on or after March 28, 1989 (the "Bank One Participants"), and Bank One, the Bridge Bank Plan, and the Bridge Bank Trust are obligated not to discriminate against any Subject Participant

and or the Federal deposit Insurance Corporation as Receiver for the Failed Banks to the extent such claims are actually paid by Bank One or the Bridge Bank Trust, as their interests may appear.

(10) The Court reserves and retains jurisdiction to determine the amount of attorney's fees, costs, and expenses to be awarded to the Plaintiffs under Section 501(g) of the Employee Retirement Income Security Act. The Court expressly determines under Rule 54(b), F. R. Civ. P., that there is no just reason for delay and expressly directs entry of this Judgment. The amount of such fees, costs, and expenses shall be determined on motion filed within thirty (30) days after entry of this Judgment. Such filing shall comply with the format established in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974).

(11) No relief has been requested or is granted respecting Banc One Mortgage.

(12) No relief has been requested or is granted respecting MCorp, MCorp Financial, or MCorp Management.

(13) Except as expressly stated in this Judgment, all relief requested is DENIED.

IT IS SO ORDERED.

THIS IS A FINAL JUDGMENT.

DONE at Galveston, Texas, this the 15th day of January, 1992.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

APPENDIX K

RECEIVED FEB 19 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
FEB 18 1992
Jesse E. Clark, Clerk
By Deputy: /s/ M Cauclo

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JIMMY F. TAYLOR, ET AL.	§	
Plaintiffs	§	
	§	
VS.	§	CIVIL ACTION
	§	NO. H-90-3815
BANK ONE, TEXAS, N.A.,	§	
ET AL.,	§	
Defendants.	§	

ORDER

Before the Court is the Motion of the Defendants Bank One, Texas, N.A. ("Bank One"); Deposit Insurance Bridge Bank Employees' Beneficiary Association; Welfare Plan of Bank One, Texas, Employees' Beneficiary Association; and Banc One Mortgage Company, Texas, f/d/a MBank Mortgage Company (collectively the "Bank One Defendants"), to Amend or Alter Judgment, and Alternative Motion for Stay Pending Appeal. For the reasons stated

below, the Motion to Amend or Alter Judgment is GRANTED IN PART and DENIED IN PART and the Motion for Stay is DENIED.

I. MODIFICATION OF JUDGMENT

Paragraph 8 of this Court's previous Order of Declaratory Judgment is stricken, and the following language is substituted in its place:

> The Bridge Bank Trust is instructed and is liable to hold and administer, for the exclusive benefit of the Subject Participants and the three individual Bank One Participants who became disabled before January 1, 1990, all funds contributed by Bank One as successor to the Failed Banks and all funds transferred by the MEBA Trust.

II. BANK ONE DEFENDANTS HAVE VIOLATED SECTION 510 OF ERISA

The Bank One Defendants' attempt to narrow the terms of section 510 of Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, is contrary to the statute's plain language. Section 510 prohibits a broad range of conduct by and "person" when such conduct is directed against an ERISA plan "participant" for the purpose of interfering with the attainment of any ERISA right. The prohibited conduct includes discrimination against participants which affects their ability to receive benefits which have not yet vested, but which they may become entitled to under the plan. The term "participant" includes former employees. 29 U.S.C. § 1002(7). Moreover, section 510 clearly applies to health benefits as well as pension benefits. *See, e.g., Kross v. Western Elec.*

Co., 701 F.2d 1238, 1242-43 (7th Cir. 1983). Thus, Bank One's attempt to disavow any duty to provide benefits to the former employees who were employed by the MBanks that were declared insolvent on March 28, 1989 (the "Failed Banks") and who retired or became disabled before March 28, 1989 (the "Subject Participants") while providing benefits for the employees of Bank One who were covered by the Mercantile Employees' Beneficiary Association Trust Welfare Plan or the Bridge Bank Plan and who retired or became disabled on or after March 28, 1989 (the "Bank One Participants") runs afoul of section 510.

III. CASE LAW DOES NOT REQUIRE THE COURT TO ALTER JUDGMENT

The Bank One Defendants argue that controlling Fifth Circuit case law requires the Court to alter or amend its judgment. It does not. In *McGann v. H & H Music Co.*, 946 F.2d 401 (5th Cir. 1991), the court held that an employer could reduce the lifetime maximum benefit available for Acquired Immune Deficiency Syndrome ("AIDS") claims from $1,000,000.00 to $5,000.00. While this affected only those plan members who wished to make AIDS related claims, and thus, in a sense, "discriminated" against those plan members with AIDS, *the change applied to all plan members*. By contrast in the instant case, Bank One has not attempted to apply a uniform change to all ERISA plan participants. Rather, it has attempted to exclude the Subject Participants entirely, while still providing benefits to the Bank One Participants. *McGann* does not sanction such activity. Indeed, *McGann* makes it clear that section 510 prohibits discrimination "motivated by a desire . . . to deprive an employee of an existing right to which he may become entitled." *Id.* at 408.

IV. BANK ONE DEFENDANTS ARE NOT ENTITLED TO A STAY PENDING APPEAL

A.

Courts usually consider four criteria to determine whether to grant extraordinary relief such as a stay pending appeal:

> (1) whether the movant has made a showing of likelihood of success on the merits; (2) whether the movant has made a showing of irreparable injury if the stay is not granted; (3) whether the granting of the stay would substantially harm the other parties; and (4) whether the granting of the stay would serve the public interest.

In re First South Sav. Ass'n, 820 F.2d 700 (5th Cir. 1987) (stay pending bankruptcy appeal). *See also United States v. Taylor*, 881 F.2d 207, 210 (5th Cir. 1989) (preliminary injunction), *cert. denied*, 493 U.S. 1072 (1990).

In the instant case, at least three of these factors are weighted against the Bank One Defendants. First, for the reasons stated in this Court's previous Order of Declaratory Judgment and in this Order, the Court concludes that the Bank One Defendants have not demonstrated a likelihood of success on the merits. Second, the record indicates that the Federal Deposit Insurance Corporation ("FDIC") will indemnify the Bank One Defendants for the costs of this action and for any liability incurred. Finally, the record indicates that the granting of a stay would substantially harm the other parties. MCorp is in Chapter 11 Bankruptcy and has only a minuscule staff available to administer benefits to the Subject Participants. Likewise, Plaintiffs are unable to

administer benefits to the Subject Participants during the pendency of appeal. If the stay is granted, the Subject Participants will be left without any benefits during the pendency of the appeal.

B.

The Bank One Defendants, however, argue that 12 U.S.C. § 91 requires this Court to stay its judgment pending appeal. Section 91 provides that "no attachment, injunction, or execution, shall be issued against [a national bank] or its property before final judgment in any suit, action, or proceeding . . . ." While it is true that "a non-restrictive reading of Section 91 is necessary to effectuate the statutory purpose . . . ." *United States v. Taylor*, 881 F.2d 207, 210 (5th Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990), there is nothing to suggest section 91 requires that a *declaratory judgment* must necessarily be stayed pending appeal.

Moreover, it is clear that the purpose of section 91 is to prevent "the premature, and potentially fatal, seizure of assets of an operational bank . . and the securing of substantial assets essential to a fair and equitable dispersal to creditors of a failed bank . . . ." *United States v. Lemaire*, 826 F.2d 387, 390 (5th Cir. 1987), *cert. denied*, 485 U.S. 960 (1988). In the instant case there is no evidence that the failure to stay this Court's judgment pending appeal will in any way undermine such purpose. Because the FDIC is paying for the defense of this action and will pay any judgment, the failure to grant a stay pending appeal will in no way affect the assets available for payment of Bank One's creditors. Additionally, the judgment gives Bank One tremendous flexibility with respect to the Bridge Bank Welfare Plan and Trust. While Bank One is obligated to fund benefits on behalf of the Subject Participants, it is free to modify the plan as long as it does not do so in a

discriminatory manner. Therefore, the Court concludes that 12 U.S.C. § 91 does not require it to grant a stay pending appeal.

Finally, there is nothing to indicate that section 91 applies to parties who are not national banks. Therefore, even assuming the Bank One Defendants' other arguments are correct, the Court should not grant a stay as regards the two nonbank Defendants: the Bridge Bank Welfare Plan and Bridge Bank Trust.

C.

Finally, the Bank One Defendants argue that the Court should grant a stay pending appeal to preserve the status quo. In general, the Court feels that maintaining the status quo is a sound policy. It is not however, the only factor to be consider in determining whether to grant a stay. *Cf. United States v. FDIC, supra.* The granting of a stay would be of only slight benefit to the Bank One Defendants; it might well prove to be catastrophic to the Plaintiffs.

It is therefore ORDERED, ADJUDGED, and DECREED that this Court's previous Order of Declaratory Judgment is hereby MODIFIED such that it is consistent with Part I of this Order.

It is further ORDERED that the Court's previous Order of Declaratory Judgment is otherwise AFFIRMED.

It is further ORDERED that the Bank One Defendants' Motion for Stay Pending Appeal is hereby DENIED.

IT IS SO ORDERED.

THIS IS A FINAL JUDGMENT.

Done at Galveston, Texas this 14th day of February, 1992.

/s/ Samuel B. Kent
Samuel B. Kent
United States District Judge

APPENDIX L

(Excerpts from Merchantile Employees' Beneficiary)
(Association Trust Agreement)
(August 1, 1983)

MERCANTILE EMPLOYEES' BENEFICIARY
ASSOCIATION TRUST AGREEMENT

Effective as of August 1, 1983

THIS AGREEMENT made and entered into in the City and County of Dallas, State of Texas, by and between Mercantile Texas Corporation, a Delaware corporation with its principal place of business in the City and County of Dallas, State of Texas (the "Company"), and Mercantile National Bank at Dallas, a national banking association with its principal place of business in the City and County of Dallas, State of Texas (the "Trustee"), effective as of August 1, 1983.

W I T N E S S E T H:

WHEREAS, the Company has adopted the Welfare Plan of the Mercantile Employees' Beneficiary Association (the "Plan") effective as of August 1, 1983, which is to be administered by a committee for the purpose of providing various welfare benefits described in section 501(c)(9) of the Internal Revenue Code of 1954, as amended (the "Code"), to the members of the Mercantile Employees' Beneficiary Association and their dependents; and

WHEREAS, the Plan and the trust created by this trust agreement are intended to qualify for tax exempt status under section 501(a) and 501(c)(9) of the Code;

NOW, THEREFORE, in consideration of the premises, the Company and the Trustee hereby agree as follows:

ARTICLE I

The name of this trust shall be the *Mercantile Employees' Beneficiary Association Trust*. This trust agreement, together with the Plan, as hereinafter defined, is intended to constitute a voluntary employees' beneficiary association within the meaning of section 501(c)(9) of the Code. For purpose of this trust agreement, the following expressions shall have the meanings respectively indicated unless the context clearly requires otherwise:

1.01 "Affiliate" shall mean any national banking association, state banking corporation, business corporation, joint venture, trust, association or other business enterprise which the Company directly or indirectly controls. As used in this Section 1.01, the term "control" means the ownership of more than fifty percent (50%) of the voting stock and of the equity interest of any such entity and ownership of at least eighty percent (80%) of the voting stock and of the equity interest of any such entity in a chain of ownership from such fifty percent (50%) owned entity.

1.02 "Beneficiary" shall mean any dependent of a Participant who is entitled to receive benefits under the terms of the Plan or any other person who has been selected by a Participant, in accordance with the provisions of the Plan, to receive death benefits or other Plan benefits that may be payable to a person other than the Participant.

1.03 "Board of Directors" shall mean the Board of Directors, as from time to time constituted, of the Company specified in Section 1.05 hereof.

1.04 "Committee" shall mean the group of individuals appointed under the Plan to administer the Plan.

1.05 "Company" shall mean Mercantile Texas Corporation, a Delaware corporation with its principal place of business in Dallas, Texas, or any corporation that succeeds Mercantile Texas Corporation as the sponsor of the Plan, whether by operation of law as a result of a corporate reorganization that causes such successor corporation to acquire the rights and assume the obligations, of Mercantile Texas Corporation or by reason of an agreement whereby such successor corporation replaces Mercantile Texas Corporation as the sponsor of the Plan.

1.06 "Employer" shall mean the Company and any Affiliate of the Company having employees participating in the Plan at any given time or the successor of any of them.

1.07 "Participant" shall mean any employee of an Employer or any other person who becomes a participant under the Plan but only with respect to the specified benefits as to which such person is a participant.

1.08 "Plan" shall mean the Plan known as the Welfare Plan of the Mercantile Employees' Beneficiary Association, as evidenced by such agreements with contract administrators and such other documents as the Company may adopt from time to time for the purpose of providing benefits described in Section 501(c)(9) of the Code.

. . . .

1.10 "Trust Fund" shall, as of a particular date, mean all assets of whatsoever kind or nature from time to time held by the Trustee pursuant to this trust agreement. While such assets may be commingled for investment

purposes, they shall be separately accounted for and separately available for use in providing only specified benefits for a specified class of Participants and Beneficiaries to the extent required under the Plan and this trust agreement, in accordance with instructions of the Committee to the Trustee or, in the absence of such instructions, as determined by the Trustee on the basis of the aid and assistance provided by the actuaries for the Plan.

1.11 "Trustee" shall mean Mercantile National Bank at Dallas, a national banking association, or any successor thereto who may be actin as trustee hereunder at the time in question.

1.12 "ERISA" shall mean the Employee Retirement Income Security Act of 1974, as from time to time amended and in effect.

1.13 Whenever a word defined herein, or a pronoun in lieu of it, is used herein in plural form, but there be only one person, corporation or item within the scope of the definition, such word, or the pronoun used in lieu of it, though in plural form, shall have the singular meaning, and vice versa. Likewise, pronouns of one gender, used in lieu of such words, shall include the other genders. The words "herein", "hereof", and "hereunder" shall refer to this agreement.

. . . .

ARTICLE III

3.02 *Direction by Committee*. The Trustee shall not be liable for any distribution made by it pursuant to written directions of the Committee as herein provided, and shall be under no duty to make inquiries as to whether any

distribution directed by the Committee is made pursuant to the provisions of the Plan or Article IV hereof. For this purpose, written directions from a person, including without limitation an insurance company or other contract administrator of claims for benefits, who has been authorized in writing to act as an agent for the Committee shall be treated as directions by the Committee with respect to such matters as are within the scope of authority that the Committee has delegated to such designated agent. The Trustee shall not be responsible for the adequacy of the Trust Fund to meet and discharge any and all liabilities under the Plan, provided that the Trustee has complied with the funding policy communicated to it in accordance with Section 8.04 hereof.

ARTICLE IV

4.01 *Trust Fund for Exclusive Benefit of Participants.* Notwithstanding anything to the contrary contained in this trust agreement, or in any amendment thereto, it shall be impossible, at any time, for any part of the Trust Fund to be recoverable by an Employer, or to be used for, or diverted to, purposes other than for the exclusive purpose of providing benefits to Participants, former Participants, or their Beneficiaries in accordance with the terms of the Plan and this trust agreement, except that taxes and expenses of administration may be paid from the Trust Fund as provided herein and, in addition, a contribution of an Employer which is made by reason of a mistake of fact may, at the direction of the Committee, be returned to such Employer within one year after its payment. No part of the net earnings of the Trust Fund shall inure to the benefit of any private shareholder or individual.

. . . .

ARTICLE V

5.05 *Standards of Conduct and Liabilities of Trustee.* The Trustee shall perform all of its duties hereunder with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, or in accordance with such other standard as may, from time to time, be required by law. The Trustee shall not cause the trust to engage in a transaction if it knows or should know that such transaction directly or indirectly constitutes a prohibited transaction under section 406 of ERISA, and shall not be liable for any conduct on its part which conforms to that standard, unless it knowingly participates in or knowingly undertakes to conceal an act or omission of another fiduciary of the Plan, with the knowledge that such act or omission is a breach of fiduciary responsibility, or knowing of a breach of fiduciary responsibility, the Trustee fails to make reasonable efforts under the circumstances to remedy the breach, or by failure to carry out its specific responsibilities, in accordance with such standard, it has enabled another fiduciary of the Plan to commit a breach.

. . . .

ARTICLE VIII

8.01 *Committee Action.* The Trustee shall be fully protected in relying upon a certification by the Committee, signed by a majority of all the members thereof, or by any member designated by all such members to act for the Committee, or the secretary thereof, with respect to any instruction, direction or approval by the Committee, except that such secretary or individual member shall not be authorized to direct any distribution to himself, and the

Trustee shall be protected also in relying upon a certification by the Company as to the membership of the Committee as it then exists, including a specimen signature of each member and the secretary, and in continuing to rely upon such certification until a subsequent certification is filed with the Trustee, or in relying upon the certification by the Company as to the nonexistence of the Committee and the consequent substitution of the president and the chief personnel officer of the Company, who may in such case act jointly or severally in lieu of the Committee, in all respects concerning the administration of the Plan under this trust agreement.

8.02 *Employer Action.* Unless the Plan provides otherwise, any action by the Company or an Employer hereunder, pursuant to the Plan or this trust agreement, shall be evidenced by a written instrument executed by the president or the chief personnel officer of the Company or the Employer or by any person authorized by said officers to take such action, and the Trustee shall be fully protected in acting in accordance with such written instrument or resolution delivered to it.

8.03 *Reliance on Written Instrument.* The Trustee shall be fully protected in acting upon any instrument, certificate, or paper believed by it to be genuine and to be signed or presented by the proper person or persons, and the Trustee shall be under no duty to make any investigation or inquiry as to any statement contained in any such writing but may accept the same as conclusive evidence of the truth and accuracy of the statements therein contained.

ARTICLE X

10.01. *Amendment of Trust Agreement.* This trust agreement may be amended at any time, and from time to time, by an instrument executed by the Company and

the Trustee, and the provisions of any such amendment may be made applicable to the Trust Fund as constituted at the time of the amendment as well as to the part of the Trust Fund subsequently acquired, provided, however, that no amendment shall be made to Section 4.01 hereof is such amendment would violate the provisions of ERISA or the Code. Any such amendment shall, unless otherwise provided therein, become effective upon execution by both the Company and the Trustee.

10.02. *Adoption by Other Employers.* Any Employer, which is eligible to and does in fact adopt the Plan, may adopt this trust by written instrument, duly executed by its president or its chief personnel officer, acknowledged and delivered to the Trustee and the Committee. However, no such adoption of the Plan or this trust shall be necessary if the Plan does not require adoption by Employers, and the Trustee may rely on written instructions from the Committee indicating that such adoption is not necessary and that the employees of a given Employer and certain other individuals are eligible to participate in the Plan.

ARTICLE XI

11.01. *Termination of Trust Fund.* This trust agreement and the trust created hereby may be terminated at any time by the Board of Directors or by the president or the chief personnel officer of the Company, or the trust may be terminated, with request to any other Employer by its board of directors or its president or chief personnel officer, and upon such termination, or upon the dissolution or liquidation of any Employer in the event that a successor to the Employer by operation of law or by the acquisition of its business interest shall not elect to continue the Plan and this trust, the Trust Fund, with respect to such Employer, shall

be paid out by the Trustee in the form of distributions to or for the benefit of Participants and Beneficiaries as and when directed by the Committee in accordance with the provisions of the Plan and Article III hereof.

11.02. *Continuation by Employer's Successor.* Any corporation succeeding to the interest of an Employer by sale, transfer, consolidation, merger or bankruptcy, may elect to continue this trust by adopting this trust agreement or by otherwise assuming the duties and responsibilities of the Plan and trust in accordance with the provisions of Section 10.02 hereof, or such corporation may establish a separate plan and trust for the continuation of benefits for its employees, in which event the trust assets, held on behalf of the employees of the prior Employer, shall be transferred to the trustee of the new trust.

ARTICLE XII

12.01. *Texas Law to Control.* Except where inconsistent with the express provisions hereof, or where preempted by ERISA, the powers and duties of the Trustee and all questions of interpretations, construction, operation and effect of this instrument shall be governed by the laws of the State of Texas, and except for such matters as may arise under ERISA, the Trustee shall be liable to account only in the courts of that state. All contributions to the Trustee shall be deemed to take place in the State of Texas. Should any provision or provisions of this trust agreement be held invalid or illegal for any reason, such illegality or invalidity shall not affect the remaining provisions of this trust agreement, but shall be fully severable, and the trust agreement shall be construed and enforced as if such illegal or invalid provisions had never been inserted herein.

12.02. *Construction of Trust Agreement.* This trust is intended to qualify as a tax-exempt trust under sections 501(a) and 501(c)(9) of the Code, and the provisions hereof shall be interpreted consistent with such intention. If and whenever the Trustee may be, in good faith, in doubt as to the proper construction or interpretation of this trust agreement, or any other question that may arise during the administration of the trust herein created, the Trustee is authorized to resolve all such doubts and questions in such manner as it may deem proper, without the necessity of resorting to a court for construction or instructions and all decisions so made shall be binding and conclusive on all persons ever interested hereunder. In addition, the Trustee may apply to the Committee for instructions, directions, authorization, or information, and the Trustee may demand assurances satisfactory to it that any action it is directed to take will not adversely affect the tax exemption of the trust; provided, however, that no such assurances shall be required if, in the opinion of counsel for the Company, such action does not adversely affect the tax exemption of the trust. This trust agreement shall be binding upon all persons who are ever entitled to any benefits hereunder, their heirs, executors, administrators and legal representatives, and upon Employers and their successors and assigns and upon the Trustee and its successors and assigns.

12.03. *Court Proceedings.* The Trustee may at any time initiate an action or proceeding for the settlement of accounts or for the determination of any question of construction which may arise or for instructions, and the only necessary parties defendant to such action shall be all Employers and the Committee, except that the Trustee may, if it so elects, bring in as parties defendant any other person or persons.

. . . .

12.07. *Rights Determined from Entire Instrument.* This trust agreement, for convenience only, has been divided into articles and sections, but the right, powers, duties, privileges and other legal relationships shall be determined from this trust agreement as an entirety and without regard to the division into articles and sections or to the headings prefixed to said sections.

12.08. *Execution and Counterparts.* This trust agreement shall be executed in any number of counterparts, each one of which shall be deemed to be an original although the others shall not be produced.

IN WITNESS WHEREOF, this agreement has been executed this 4th day of August , 1983, effective as of August 1, 1983.

ATTEST:	MERCANTILE TEXAS CORPORATION
/s/ Donne M. Banks (Seal)	By /s/ Gary L. Patsley
ATTEST:	MERCANTILE NATIONAL BANK AT DALLAS, Trustee
/s/ James W. Rushie (Seal)	By /s/ illegible

THE STATE OF TEXAS)(
)(
COUNTY OF DALLAS)(

BEFORE ME, the undersigned authority, on this day personally appeared /s/ illegible of Mercantile Texas Corporation, known to me-to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity therein stated, and as the act and deed of said corporation.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 4 day of August , 1983.

/s/ illegible
Notary Public in and for
Dallas County, Texas

My Commission Expires
3-16-85

THE STATE OF TEXAS)(
)(
COUNTY OF DALLAS)(

BEFORE ME, the undersigned authority, on this day personally appeared Frank B. Dunlap, III , Vice President of Mercantile National Bank at Dallas, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 21st day of July , 1983.

/s/ Glenda Crenshaw
Notary Public in and for
Dallas County, Texas

My Commission Expires:
June 2, 1986

APPENDIX M

(Excerpts From MCorp Cafeteria Plan)
(As Amended)
(Effective July 1, 1984)

MERCANTILE TEXAS CORPORATION FLEXIBLE BENEFITS PLAN

1. *GENERAL*

1.1 *Purpose.* The purpose of this Plan is to furnish Employees of the Employers with choices among various employee benefits or cash compensation. The Employers recognize that the employee benefit needs of individual Employees differ, depending on the age, salary and number of dependent of the Employee, and the Employers desire to permit Employees to select and tailor the benefits they receive in a manner calculated to best meet their particular needs. The Employers further desire to permit their Employees to choose, to the extent permitted by applicable law, between taxable and nontaxable compensation.

1.2 This Plan is intended to qualify as a non-discriminatory cafeteria plan under Section 125 of the Code. Accordingly, this Plan shall be interpreted and construed in accordance with Section 125, the regulations issued thereunder, and any other published judicial or administrative interpretations thereof.

1.3 The Benefit Plans offered under this Plan may be the subjects of separate plan documents, trust agreements, or administrative services contracts. Any such other plan documents, trusts or contracts are incorporated herein by reference.

1.4 This Plan shall be referred to as the "Mercantile Texas Corporation Flexible Benefits Plan." It is anticipated that the name of this Plan will be changed pursuant to reorganization of the Company and SBI.

. . . .

2.2 "Benefit" means any of the benefits which may be purchased or are required to be purchased under this Plan, as enumerated in Article V and Article VI of this Plan.

2.3 "Benefit Plan" refers to the specific terms and conditions regarding a Benefit which may be purchased under this Plan, including the terms and conditions of any separate plan document, trust agreement or administrative services contract regarding such Benefit.

2.4 "Code" means the Internal Revenue Code of 1954, as amended from time to time.

2.5 "Committee" means the Committee which administers this Plan, as appointed under Article 8.1 of this Plan.

. . . .

2.6 "Company" means Mercantile Texas Corporation or its successor.

2.10 "Employee" means any person rendering services to an Employer for remuneration which is subject to federal income tax withholding and FICA taxes.

2.11 "Employer" means each corporation or business enterprise which adopts this Plan or is deemed to adopt this Plan pursuant to Article 10.2 of this Plan.

. . . .

2.14 "Participant" means and Employee who meets the eligibility requirements for participation as set forth in Article III of this Plan and who elects, or is deemed to elect, Benefits under this Plan.

. . . .

2.16 "Plan" means the Mercantile Texas Corporation Flexible Benefits Plan, as amended from time to time.

. . . .

2.19 "SBI" means Southwest Bancshares, Inc. and its subsidiaries and affiliates.

2.20 "Southwest Bancshares Flexible Benefits Plan" means the Southwest Bancshares Flexible Benefits Plan.

2.21 "Termination of Employment" means the termination of a Participant's employment with an Employer, whether by reason of discharge, voluntary termination, disability, retirement, or death. "Termination" shall not include the transfer of a Participant from one Employer to another Employer, nor the transfer of a Participant from and Employer to SBI.

III. *ELIGIBILITY FOR PARTICIPATION*

3.1 *Generally.* All full-time Employees of an Employer in continous active employment from March 15 to July 1 of any calendar year are eligible to participate in the Plan for the Plan Year starting on July 1 of the same calendar year. An Employee is a full-time Employee for

purposes of this Article if he is regularly scheduled to work thirty hours or more per week.

. . . .

3.5 *Termination of Employment.* Except to the extent a Benefit Plan provides otherwise, each Participant's eligibility to participate in this Plan and his coverage under each Benefit Plan shall terminate on the Participant's Termination of Employment.

3.6 *Additional Requirements.* Various of the Benefit Plans incorporated in this Plan may have their own eligibility requirements for participation. The eligibility rules of this Plan are in addition to any such eligibility rules.

. . . .

V. *ELECTIVE BENEFITS UNDER THE PLAN*

5.1 *Generally.* Subject to the requirements of Article VI of this Plan regarding Minimum Benefits and Article VII of this Plan regarding elections, and subject to the Committee's discretion to reduce the maximum coverage under any Benefit Plan, each Participant may elect to purchase any of the Benefits set forth in this Article at a Price Tag as determined below. The Benefit Plans may be the subject of separate plan documents, trust agreements or contracts, the terms of which are incorporated herein by reference. The provisions of this Article regarding Benefit Plans covered by a separate document are intended only as a descriptive summary, and in case of any conflict between this Article and a separately documented Benefit Plan, the latter shall control.

5.2 *Medical Benefits Plan.* The Medical Benefits Plan provides medical coverage for (1) the Participant only; (2) the Participant plus child or children; (3) the Participant plus spouse; or (4) the Participant and his family, including both spouse and children. The Participant may elect from among four options as to the level of coverage : (i) the "basic" option, with a $1,500 deductible and 90% co-insurance; (ii) the "medium" option, with a $700 deductible and 85% co-insurance;(iii) the "premium" option, with a $150 deductible and 80% co-insurance; or (iv) health maintenance organization options, available in some locations. For Plan Years after the Plan Year beginning July 1, 1984, the Committee may in its discretion establish different coverage options; provided, however, that the maximum coverage so offered may not exceed the maximum available coverage stated herein.

The Price Tag for each Medical Benefits Plan option will vary depending on family status category and the level of coverage elected. The Price Tags will be determined annually and will represent an actuarially derived estimate of the actual cost of providing annual coverage under the Medical Benefits Plan. Participants will be notified of the Price Tag of each option for a Plan Year prior to the enrollment period for the Plan Year.

The terms and conditions summarized herein and additional terms and conditions regarding the Medical Benefits Plan are set forth in a separate plan document which is incorporated by reference.

5.3 *Supplemental Health Care Plan.* The Supplemental Health Care Plan will provide reimbursements to each Participant for qualifying medical expenses of the Participant, and/or his spouse or dependents, if applicable, which are not covered by the Medical Benefits Plan or by

insurance. A Participant may elect no coverage or may elect any whole dollar amount of coverage from $240 to a maximum of $2,000 under the Supplemental Health Care Plan for a Plan Year.

The Price Tag for the Supplemental Health Care Plan is equal to the dollar amount of coverage the Participant elects for the Plan Year. For Plan Years after the Plan Year beginning July 1, 1984, the Committee may in its discretion adjust the Price Tag of the Supplemental Health Care Plan annually to reflect claims experience and may reduce the maximum amount of coverage which may be elected.

The terms and conditions summarized herein and additional terms and conditions regarding the Supplemental Health Care Plan are set forth in a separate plan document which is incorporated by reference.

5.4 *Dependent Care Plan.* The Dependent Care Plan provides reimbursements for certain services rendered for the care of the Participant's child or children under the age of 15 years or for the Participant's spouse or dependent who is incapable of self-care. A Participant may elect no coverage or may elect any whole dollar amount of coverage from $240 to a maximum of $5,000 under the Dependent Care Plan for each Plan Year.

The Price Tag for the Dependent Care Plan is equal to the dollar amount of coverage elected by the Participant for the Plan Year. For Plan Years after the Plan Year beginning July 1, 1984, the Committee may in its discretion adjust the Price Tag for coverage under the Dependent Care Plan annually to reflect claims experience and may reduce the maximum amount of coverage which may be elected.

The terms and conditions summarized herein and additional terms and conditions regarding the Dependent Care Plan are set forth in a separate written plan which is incorporated by reference.

5.5 *Employee Life Coverage Plan.* Each Participant may elect coverage on his own life in any of the following amounts: one times Compensation; two times Compensation; three times Compensation; or four times Compensation. For Plan Years after the Plan Year beginning July 1, 1984, the Committee may in its discretion establish different coverage options; however, that the maximum coverage so offered may not exceed the maximum available coverage stated herein.

The Price Tag of each option represents an estimate of the actuarial cost of providing coverage for the Plan Year, determined annually. The Price Tags will be announced to all Participants prior to the enrollment period for each Plan Year.

The terms and conditions summarized herein and additional terms and conditions regarding the Employee Life Coverage Plan are set forth in a separate written plan which is incorporated by reference.

5.6 *Family Life Coverage Plan.* Each Participant may elect no coverage, or may elect coverage on the life of his spouse and/or children from among the following options: (1) no coverage: (2) $5,000 on the spouse; $2,000 per child, $500 per infant; (3) $10,000 on the spouse, $2,000 per child, $500 per infant; or (4) $15,000 on the spouse, $2,000 per child, and $500 per infant. For Plan Years after the Plan Year beginning July 1, 1984, the Committee may in its discretion establish different coverage options; provided,

however, that the maximum coverage so offered may not exceed the maximum available coverage stated herein.

The Price Tag for each Family Life Coverage option represents an estimate of the actuarial cost of providing coverage for the Plan Year, determined annually. The Price Tags will be announced to the Participants prior to the enrollment period for each Plan Year.

The terms and conditions summarized herein and additional terms and conditions regarding the Family Life Coverage Plan are set forth in a separate written plan which is incorporated by reference.

5.7 *Accidental Death Coverage Plan.* The Accidental Death Coverage Plan provides benefits in the event of accidental death or dismemberment of the Participant and, if applicable, his spouse and children. Each Participant may elect no coverage or may elect among such options as the Committee approves, up to 10 times the Participant's Compensation (determined as of March 15 of the calendar year in which the Plan Year commences) to a maximum of $300,000.

The Price Tag of each Accidental Death Coverage option represents an estimate of the actuarial cost of providing coverage for the Plan Year, determined annually. The Price Tags will be announced to Participants prior to the enrollment period for each Plan Year.

The terms and conditions summarized herein and additional terms and conditions regarding the Accidental Death Coverage Plan are set forth in a separate written plan which is incorporated by reference.

5.8 *Long-term Disability Plan.* The Long-Term Disability Plan provides benefits, offset by Social Security and certain other benefits, in the event of the Participant's total disability. The coverage options under the Long-term Disability Plan are: (1) 50% of the Participant's Compensation at the time of disability; (2) 60% of the Participant's Compensation at the time of disability; or (3) 70% of the Participant's Compensation at the time of disability. For Plan Years after the Plan Year beginning July 1, 1984, the Committee may in its discretion establish different coverage options; provided, however, that the maximum coverage so offered may not exceed the maximum available coverage stated herein.

The Price Tag for each coverage option under the Long-term Disability Plan represents an estimate of the actuarial cost of providing coverage for the Plan Year, determined annually. The Price Tags will be announced to Participants prior to the beginning of the enrollment period for each Plan Year.

The terms and conditions summarized herein and additional terms and conditions regarding the Long-Term Disability Plan are set forth in a separate written plan which is incorporated by reference.

. . . .

VI. *MINIMUM BENEFITS*

6.1 *Generally.* Each Participant who elects to purchase Benefits under this Plan must purchase with his Benefit Dollars at least the Minimum Benefits set forth in this article.

6.2 *Medical Benefits.* Each Participant must elect at least the smallest amount of coverage offered and must select the family status category for each Plan Year which is the same category on which his Benefit Dollars for the Plan Year were calculated.

6.3 *Employee Life Insurance.* Each Participant is required to elect at least the smallest amount of coverage offered.

6.4 *Long-Term Disability.* Each Participant must elect at least the smallest amount of coverage offered.

6.5 *Committee Discretion.* The Committee may, in its discretion, prescribe different Minimum Benefits for any Plan Year after the first Plan Year.

VIII. *ADMINISTRATIVE PROVISIONS*

8.1 *Committee.* Except to the extent a Benefit Plan provides otherwise, this Plan shall be administered by a Committee comprised of at least three individuals, who shall be appointed by the Compensation Committee of the Board of Directors of the Company. If the Compensation Committee of the Board of Directors fails to appoint a Committee, such Compensation Committee shall act as the Committee. The Committee shall appoint a Plan Administrator who shall carry out the duties specified in Section 8.8 of this Plan, who may, but need not be, a member of the Committee. Each member of the Committee shall serve for a term of one year or until his successor is appointed. A member may serve for more than one term. All expenses of the Committee shall be paid by the Employers. A member of the Committee who is an Employee of an Employer shall not receive any additional Compensation with respect to his services on the Committee.

8.2 *Duties and Powers of Committee.* Except to the extent a Benefit Plan provides otherwise, the Committee shall have such duties and powers as may be necessary to administer this Plan, including, but not by way of limitation, the following:

a. To construe and interpret the Plan, and decide all questions of eligibility;

b. To prescribe procedures to be followed by Participants in making elections under the Plan and in filing claims under the Plan;

c. To prepare and distribute information explaining the Plan to Participants;

d. To receive from Employers and from Participants such information as shall be necessary for the proper administration of the Plan;

e. To furnish the Company and Employers such annual reports with respect to the administration of the Plan as are reasonable and appropriate;

f. To keep reports of elections, claims, and disbursements for claims under the Plan;

g. To appoint individuals or committees to assist in the administration of the Plan and to engage any other agents it

deems advisable, including legal and actuarial counsel;

h. To purchase any insurance deemed necessary for providing Benefits under this Plan;

i. To accept, modify or reject elections under the Plan;

j. To promulgate election and claims forms to be used by Participants;

k. To prepare and file any reports or returns with respect to the Plan required by the Internal Revenue laws or any other laws;

l. To fulfill such other duties or exercise such other powers as are set forth in any Benefit Plan.

Provided, however, that the Committee shall have no power to amend or terminate this Plan.

8.3 *Claims Procedures*. The Committee will be responsible for making all determinations as to the rights of any Participant or any beneficiary of a Participant to receive amounts under the Plan except to the extent a Benefit Plan provides to the contrary. The Committee may prescribe forms and procedures for making claims for benefits under the Plan to the extent such forms or procedures are not prescribed by the terms of a Benefit Plan. Any denial by the Committee of a claim for benefits under the Plan shall be stated in writing by the Committee, setting forth specific reasons for the denial. The Committee shall afford a reasonable opportunity to any Participant or beneficiary

whose claim for benefits has been denied for a review of the decision of the Committee denying the claim.

8.4 *Rules and Decisions.* The Committee may adopt such rules and procedures as it deems necessary, desirable or appropriate. All rules and decisions of the Committee shall be uniformly and consistently applied to all Participants in similar circumstances. When making any decision or determination, the Committee shall be entitled to rely upon such information as may be furnished to it by an Employee, a Participant, an Employer, legal counsel, or the administrator of any Benefit Plan which is subject to this Plan.

8.5 *Organization.* The Committee may act at a meeting or in writing without a meeting. The Committee may adopt such by-laws and regulations as it deems desirable. Records shall be kept of all the Committee's meetings. All decisions of the Committee shall be made by a majority vote of its members.

8.6 *Indemnification.* The Committee and the Administrator shall be indemnified by the Employers against any and all liabilities arising by reason of any act or failure to act in good faith pursuant to the provisions of the Plan, including expenses reasonably incurred in the defense of any claim relating thereto.

8.7 *Directions Regarding Benefits.* Except to the extent a Benefit Plan provides otherwise, the Committee shall issue directions to each Employer concerning all amounts which are to be paid from the Employer's general assets under the Plan; the Committee shall issue directions to any insurer concerning any amounts to be paid by an insurer pursuant to the Plan; and the Committee shall issue directions to the trustee of any trust established to fund Benefits

concerning any amounts to be paid by such trustee pursuant to the Plan.

8.8 *Plan Administrator's Duties.* "Plan Administrator" shall mean the person appointed pursuant to Article 8.1 hereof. The Plan Administrator is hereby appointed the "named fiduciary" of the Plan and shall exercise such authority and responsibility as the Plan Administrator deems appropriate to comply with the provisions of federal law and regulations issued thereunder and to carry out any duties delegated to the Plan Administrator in writing by the Committee. The Plan Administrator shall be the designated agent for service of legal process.

IX. *FUNDING*

9.1 *No Obligation to Insure or Fund Benefits.* The Employers shall have no obligation, but shall have the right, to insure any Benefits under this Plan or to establish any fund or trust for the payment of Benefits under this Plan.

9.2 *Insured Benefits.* In the case of any Benefit which is insured with an insurance company, any Benefits accruing shall be paid solely by such insurance company, and the Employers shall have no responsibility for the payment of such Benefits.

9.3 *Benefit Funded Through Trust.* In the case of any Benefit which is funded through contributions to a trust, any Benefits accruing shall be payable solely out of the assets of such trust, and the Employers shall have no responsibility for the payment of such Benefits beyond the Employees' contributions to such trust.

9.4 *Non-insured, Non-funded Benefits.* Payments of all Benefits under this Plan with respect to each Employee which are not insured or funded through a trust shall be made solely out of the general assets of such Employee's Employer.

9.5 *No Interest Obligation.* The Employers shall have no obligation to pay interest on any Participant's Flex Dollars.

X. *AMENDMENTS; ADOPTION; WITHDRAWALS; OBLIGATIONS OF EMPLOYERS.*

10.1 *Amendments or Termination.* The Company shall have the sole right to alter, amend or terminate this Plan in whole or in part at any time it determines to be appropriate. The Company may amend, alter, or terminate this Plan retroactively in its discretion. The Company shall act through the Compensation Committee of its Board of Directors or through any party properly authorized to so act by Board resolution.

10.2 *Adoption of Plan by Employers.* The Company and any corporation or business enterprise, now in existence or hereafter formed, which is or becomes affiliated with the Company may, with the consent and approval of the Compensation Committee of the Board of Directors of the Company, and through action of such corporation's or enterprise's Board of Directors or other governing authority (or through action of an officer or committee duly authorized or ratified by such corporation's or enterprise's Board of Directors or other governing authority), adopt this Plan or any Benefit Plan hereunder for its Employees. Adoption of this Plan shall constitute adoption of all Benefit Plans hereunder, unless resolutions of the Compensation Committee of the Board of Directors of the Company and of

the Board of Directors or other governing authority of the Employer provide otherwise. Any such corporation or enterprise adopting this Plan shall be referred to as an "Employer".

The Administrator may negotiate specific changes and variations in the terms of this Plan or of any Benefit Plan hereunder, which shall be applicable to a particular Employer and may negotiate any terms, conditions or other matters regarding the adoption of this Plan by an Employer. The adoption and any changes or variations in terms shall be approved by the Board of Directors or other governing authority of the Employer (or by an officer or committee duly authorized by the Employer's Board of Directors or other governing authority) and shall be ratified by resolution of the Compensation Committee of the Board of Directors of the Company.

. . . .

10.3. *Obligations of Employer.* Each Employer shall pay any amounts necessary to fund or insure any Benefits hereunder for its Employees. Each Employer shall pay any unfunded, uninsured Benefits of its Employees. Each Employer shall keep such records and furnish such information with respect to its Employees as the Committee shall require. Each Employer may be require to pay its pro rata share of the costs of administering this Plan and Benefit Plans hereunder.

10.4 *Withdrawal.* Any Employer by action of its Board of Directors or other governing authority and notice of at least thirty (30) days to the Board of Directors of the Company and to the Committee may withdraw from the Plan at any time without affecting other Employers not withdrawing. A withdrawing Employer may arrange for the

continuation by itself or its successor, of the Plan in separate form for its own Employees, with such amendments, if any, as it may deem proper. The Company may, in its absolute discretion, terminate an Employer's participation at any time when in its judgment such Employer fails or refuses to discharge its obligations under the Plan or under any Benefit Plan. Withdrawal from the Plan by an Employer or termination of the Employer's participation by the Company shall not affect the continued operation of the Plan with respect to the Company and other Employers.

XI. *MISCELLANEOUS*

11.1 *No Employment Contact.* Nothing contained in this Plan shall be construed as a contract of employment between any Employer and any Employee, nor as a guarantee of any Employee to be continued in the employment of an Employer nor as a limitation on the right of an Employer to discharge any of its Employees with or without cause.

11.12 *No Assignment.* A Participant's rights, interests or benefits under this Plan shall not be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, charge, garnishment, execution or levy of any kind, either voluntary or involuntary, prior to being received by the persons entitled thereto under the terms of a Benefit Plan or this Plan, and any such attempt shall be void.

11.3 *Choice of Law.* This Plan shall be construed, administered and governed in all respects under applicable federal law, including, without limitation, the provisions of the Employment and Retirement Income Security Act of 1974 and the Code and relevant interpretations thereof, and to the extent not preempted by federal law, under the laws of the State of Texas.

11.4 *Severability.* If any provision of this Plan shall be held by a court of competent jurisdiction to be invalid or unenforceable, the remaining provisions hereof shall continue to be fully effective.

11.5 *Gender, Singular and Plural References.* References in this Plan to one gender shall include both genders, singular references shall include the plural, and plural references shall include the singular, unless the context clearly requires otherwise.

11.6 *Effective Date.* The effective date of this Plan is July 1, 1984.

IN WITNESS WHEREOF, MCORP MGHT , as the Employer, has caused this instrument to be executed, sealed and attested, in a number of original counterparts, each of which shall be taken to be an original and all collectively but one instrument this 19 day of October , 1984, effective July 1, 1984.

/s/ MCORP MANAGMENT
Employer

/s/ Michael D. Magill

By: /s/ illegible
TITLE Senior Vice President

(CORPORATE SEAL)

STATE OF Texas §
§
COUNTY OF Harris §

BEFORE ME, the undersigned, a Notary Public in and for said County and State on this 19 day of October , 1984, personally appeared Mark Pabst , Senior Vice President of MCorp Management , to me known to be the identical person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same as his free and voluntary act and deed and as the free and voluntary act and deed of such organization, for the uses and purposes therein set forth.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, the day and year last above written.

/s/ Esther DePauw
Notary Public

My Commission Expires:

Ester DePauw
Notary Public, State of Texas
My Commission Expires May 29, 1988
(NOTARY SEAL)

AMENDMENT NO. 1 TO THE MERCANTILE TEXAS CORPORATION FLEXIBLE BENEFITS PLAN

Recitations

Effective July 1, 1984, Mercantile Texas Corporation (the "Company") adopted the Mercantile Texas Corporation Flexible Benefits Plan (the "Plan"), and Southwest Bancshares, Inc. adopted the Southwest Bancshares Flexible Benefits Plan. Mercantile Texas Corporation and Southwest Bancshares, Inc. were involved in a corporate merger effective October 10, 1984, as a result of which the Company was named "MCorp" and Southwest Bancshares ceased to exist. Pursuant to the terms of Section 10.2 of the Plan and Section 10.1 of the Southwest Bancshares Flexible Benefits Plan, effective as of the date of said merger, the two plans merged automatically into a single plan governed by the terms of the Plan. Pursuant to Section 10.1 of the Plan, the Company has the sole right to alter or amend the Plan. The Compensation Committee of the Company, pursuant to its authority granted by resolution of the Board of Directors of the Company dated October 10, 1984, has approved and authorized execution of this Amendment No. 1 to the Plan.

Now, therefore, pursuant to the powers so reserved in the Plan, the Company, by this instrument, does hereby amend certain provisions of the Plan, effective as of the 10 day October , 1984, unless otherwise stated herein.

I.

Section 1.4 of the Plan is hereby amended to read as follows:

1.4 This Plan shall be referred to as the "MCorp Cafeteria Plan."

Section 2.16 of the Plan is amended to read as follows:

2.16 "Plan" means the MCorp Cafeteria Plan, as amended from time to time.

These amendments are effective October 10, 1984.

II.

Section 3.1 of the Plan is amended by substituting "forth" in the place of "thirty" in the last sentence of that Section. This amendment, being the correction of a scrivener's error, is effective July 1, 1984.

III.

Section 5.3 of the Plan is amended by adding the following sentence at the end of the first paragraph of that Section:

A Participant whose coverage under the Supplemental Health Care Plan commences later than the first day of a Plan Year shall be limited to an amount of coverage for such Plan Year equal to the maximum stated hereinabove multiplied by a fraction, the numerator of which is the remaining number of pay periods in the Plan Year after such Participant's coverage begins, and the denominator of which is the total number of pay periods in such Plan Year.

Article 5.4 of the Plan is amended by adding the following sentence at the end of the first paragraph of that Section:

> A participant whose coverage under the Dependent Care Plan commences later than the first day of a Plan Year shall be limited to an amount of coverage for such Plan Year equal to the maximum stated hereinabove multiplied by a fraction, the numerator of which is the remaining number of pay periods in the Plan Year after such Participant's coverage begins, and the denominator of which is the total number of pay periods in such Plan Year.

IV.

Section 7.4 of the Plan is amended by adding the following language before the last sentence thereof:

> If a Participant's family responsibilities change after end of the enrollment period for a Plan Year due to birth or adoption of a child, due to death of a child or spouse, due to marriage or divorce, or due to the loss of his spouse's job, the Participant may revoke his election with respect to the Family Life Coverage plan and make a new election for the remainder of the Plan Year consistent with the change in his family responsibilities.

V.

Except as amended by this instrument, the Plan shall remain in full force and effect.

IN WITNESS WHEREOF, MCorp has caused this instrument to be executed and attested in a number of original counterparts, each of which shall be taken to be an original and all collectively but one instrument as of this 6 day of March , 1985.

MCORP

By: /s/ illegible

ATTEST:

By: /s/ illegible

APPENDIX N

(Letter, and Enclosure ,Certified Copy of
Corporate Resolutions Adopted May 5, 1989
from Deposit Insurance Bridge Bank, N.A.
To Benefits Committee of MCorp Pension Plan,
Board of Directors of MCorp and MTrust Corp.,
N.A.(now known as Ameritrust, Texas, N.A.)

May 10, 1989

VIA REGISTERED MAIL
RETURN RECEIPT REQUESTED

Benefits Committee
MCorp Pension Plan
Attention: Eugene Weber
11th Floor Momentum Place
Dallas, Texas 75201

Board of Directors
MCorp
Attention: Gene Bishop
20th Floor Momentum Place
Dallas, Texas 75201

MTrust Corp. N.A.
Trustee of MCorp Pension Plan
Attention: Eugene Weber
11th Floor Momentum Place
Dallas, Texas 75201

Re: *Notice of Withdrawal From MCorp Benefit Plans and Trust*

Dear Sirs:

Deposit Insurance Bridge Bank, N.A. ("Bridge Bank"), as successor to the twenty former MBanks listed below, has elected to withdraw from the following welfare benefit plans sponsored by MCorp: the MCorp Cafeteria Plan, the MCorp Cafeteria Plan for Part-Time Employees, the MCorp Dependent Care Plan, and the MCorp Supplemental Health Care Plan (the "MCorp Welfare Plans"). Each of the MCorp Welfare Plans requires that a participating employer, or the successor to a participating employer, provide thirty days advance notice of withdrawal. Bridge Bank has adopted successor welfare benefit plans with terms virtually identical to the MCorp Welfare Plans, and the Bridge Bank welfare benefit plans will be effective immediately upon withdrawal from the MCorp Welfare Plans. Please consider this letter to be notice of withdrawal from the MCorp Welfare Plans, and Bridge Bank respectfully requests that the 30 day notice requirement be waived so that Bridge Bank employees may begin to immediately participate in the Bridge Bank successor plans. Enclosed with this letter you will find a certified resolution of the Board of Directors of Bridge Bank authorizing the undersigned to effect the withdrawal of Bridge Bank from the MCorp Welfare Plans.

In addition, you are hereby notified that, in accordance with Section 11.02 of the MCorp Employees' Beneficiary Association Trust Agreement ("MCorp VEBA"), Bridge Bank, as successor employer to the twenty former MBanks listed below, has elected to establish a separate trust agreement for the continuation of benefits for its employees, and Bridge Bank hereby requests that the trust assets held in the MCorp VEBA on behalf of the active employees of Bridge Bank be transferred to MTrust Corp., N.A., as Trustee of the Bridge Bank Employees' Beneficiary Association Trust Agreement ("Bridge Bank VEBA"). In accordance with Section 11.02 of the MCorp VEBA, the assets which should be transferred to the Bridge Bank VEBA

should be the pro rata portion of the assets held in the MCorp VEBA which relate to the active employees of Bridge Bank.

Bridge Bank is the successor to: MBank Abilene, N.A., MBank Corsicana, N.A.,MBank Dallas, N.A., MBank Fort Worth, N.A., MBank Greenville, N.A., MBank Marshall, N.A., MBank MidCities, N.A., MBank Wichita Falls, N.A., MBank Houston, N.A., MBank The Woodlands, N.A., MBank Denton County, N.A., MBank Jefferson County, N.A., MBank Longview, N.A., MBank Orange, N.A., MBank Sherman, N.A., MBank Alamo, N.A., MBank Austin, N.A., MBank Brenham, N.A., MBank Odessa, N.A., and MBank Round Rock, N.A.

If you have any questions concerning this matter, please contact the undersigned within 15 days from the date of this letter.

Very truly yours,

/s/ James B. Gardner
James B. Gardner, President
Deposit Insurance Bridge Bank, N.A.

Id/5939t

CERTIFIED COPY OF CORPORATE RESOLUTIONS
PENSION PLANS AND WELFARE BENEFIT PLANS

I, Gloria R. Marr , do hereby certify that I am the Board Secretary of The Deposit Insurance Bridge Bank, National Association ("Bridge Bank"), and as Secretary I have access to all original records of Bridge Bank, and I do hereby further certify that at a special meeting of the Board of Directors duly called, held and convened according to law on the 5th day of May, 1989, a quorum being present and voting thereon, the following preambles and resolutions were unanimously adopted; that the following is a true and correct copy of said preambles and resolutions as they appear in the minutes of Bridge Bank; that the same have not been altered, amended or repealed and are now in full force and effect; and that I am one of the duly authorized officers of Bridge Bank to make certified copies of its records in its behalf.

WHEREAS, the Federal Deposit Insurance Corporation, organized under the laws of the United States of America, as receiver of MBank Abilene, N.A., MBank Corsicana, N.A., MBank Dallas, N.A., MBank Fort Worth, N.A., MBank Greenville, N.A., MBank Marshall, N.A., MBank MidCities, N.A., MBank Wichita Falls, N.A., MBank Houston, N.A., MBank The Woodlands, N.A., MBank Denton County, N.A., MBank Jefferson County, N.A., MBank Longview, N.A., MBank Orange, N.A., MBank Sherman, N.A., MBank Alamo, N.A., MBank Austin, N.A., MBank Brenham, N.A., MBank Odessa, N.A., and MBank Round Rock, N.A. (the "Failed Banks"), has sold and transferred substantially all of the assets of the Failed Banks to The Deposit

Insurance Bridge Bank, National Association ("Bridge Bank"), an insured bank within the meaning of the Federal Deposit Insurance Act, organized and existing as a bridge bank under 12 U.S.C. §1821(i), as amended, and having its principal place of business in Dallas, Texas; and

WHEREAS, each of the Failed Banks was a participating employer in the MCorp Pension Plan and the MCorp MoneyMax Plan (the "Pension Plans") under the terms thereof; and

WHEREAS, Section 14.05 of both Pension Plans authorize Bridge Bank, in its capacity as successor to a participating employer in the Pension Plans, to continue the Pension Plans by delivery of a written notice to that effect to the Benefits Committee of the Pension Plans, the Board of Directors of MCorp and to MTrust Corp, N.A., as trustee of the Pension Plans, which notice shall be in the form of a resolution of the Board of Directors of Bridge Bank (the "Board"); and

WHEREAS, the Board has determined that it is in the best interest of the employees of Bridge Bank who participate in the Pension Plans to continue the Pension Plans with respect to the Failed Banks until such time as separate pension plans are established by Bridge Bank; and

WHEREAS, each of the Failed Banks was a participating employer in the MCorp Cafeteria Plan, the MCorp Cafeteria Plan for Part-Time Employees, the MCorp Dependent Care Plan and the MCorp Supplemental Health Care Plan (the "Welfare Plans"); and

WHEREAS, Section 10.4 of the MCorp Cafeteria Plan and the MCorp Cafeteria Plan for Part-Time Employees and Section 9.4 of the MCorp Dependent Care Plan and the MCorp Supplemental Health Care Plan authorize the withdrawal of a participating employer from the Welfare Plans and the continuation in separate form of said Welfare Plans by the successor of such participating employer; and

WHEREAS, the Board has determined that it is in the best interest of the employees of Bridge Bank who participate in the Welfare Plans to withdraw from the Welfare Plans and to adopt the Bridge Bank Cafeteria Plan, the Bridge Bank Cafeteria Plan for Part-Time Employees, the Bridge Bank Dependent Care Plan and the Bridge Bank Supplemental Health Care Plan (the "Successor Welfare Plans"), as successor plans to the Welfare Plans, thus providing a continuation of the benefits provided under the Welfare Plans with no gap or lapse in coverage under the Welfare Plans and said Successor Welfare Plans; and

WHEREAS, each of the Failed Banks was a participating employer under the MCorp Employees' Beneficiary Association Trust Agreement (the "Welfare Trust"), which is the funding medium for certain benefits offered under the Welfare Plans; and

WHEREAS, Section 11.02 of the Welfare Trust authorizes the establishment by the successor of a participating employer of a separate plan and trust for the continuation of benefits under the Welfare Plans; and

WHEREAS, the Board has determined that it is in the best interest of the employees of Bridge Bank who participate in the Welfare Plans to adopt the Bridge Bank Employees' Beneficiary Association Trust (the "Successor Welfare Trust"), as a successor trust to the Welfare Trust, thus

providing a continuation of the funding medium for certain benefits provided under the Welfare Plans, with no gap or lapse in time between the Welfare Trust and said Successor Welfare Trust:

NOW, THEREFORE, BE IT RESOLVED that Bridge Bank hereby elects to continue participation in the Pension Plans as successor to the Failed banks by adopting the Pension Plans, thereby succeeding as a participating employer under the Pension Plans; and

FURTHER RESOLVED that the President of Bridge Bank and any officer designated by the President be, and hereby are, authorized to deliver to the Benefits Committee of the Pension Plans, the Board of Directors of MCorp and to MTrust Corp, N.A., as trustee, a certified copy of the preambles and resolutions authorizing the continuation and adoption of the Pension Plans by Bridge Bank and to take such further action and execute any additional documents (including, without limitation, any supplemental trust agreement with MTrust Corp, N.A., as trustee) as may reasonably be required to effectuate such continuation of the Pension Plans and to carry out the purposes of the foregoing resolutions; and

FURTHER RESOLVED that the Bridge Bank MoneyMax Plan and Trust (the "Successor MoneyMax Plan and Trust"), a copy of said Successor MoneyMax Plan and Trust having been presented to the Board at this meeting, be and they hereby are approved and adopted, effective June 1, 1989, and the President of Bridge Bank and any officer designated by the President be, and hereby are, authorized to execute said Successor MoneyMax Plan and Trust, and to take or cause to be taken such other actions in the name and on behalf of Bridge Bank, including the amendment of said Successor MoneyMax Plan and Trust, as in the judgment of

said officer shall be necessary, desirable or appropriate to (i) effect the adoption of said Successor MoneyMax Plan and Trust, (ii) clarify or interpret said Successor MoneyMax Plan and Trust, or (iii) obtain and maintain approval of appropriate governmental agencies that said Successor MoneyMax Plan and Trust complies with all requirements of the Internal Revenue Code of 1986, as amended, and all other applicable laws and regulations; and the President of Bridge Bank and any officer designated by the President are further authorized to effect the withdrawal from the MCorp MoneyMax Plan and Trust at such time as is appropriate with no gap or lapse in coverage under the MCorp MoneyMax Plan and Trust and the Successor MoneyMax Plan and Trust; and

FURTHER RESOLVED that the President of Bridge Bank and any officer designated by the President be, and hereby are, authorized, empowered and directed to prepare or cause to be prepared and to execute or cause to be executed such other documents, including, but not limited to, an Application for Determination, Employee Census, Power of Attorney, and Summary Plan Description, as may be necessary with respect to the successor MoneyMax Plan and Trust to obtain a favorable determination from the IRS and/or comply with applicable law; to file such forms with the appropriate governmental agency, to notify all interested parities of the application to be made with the IRS, to pay such expenses and fees in connection therewith and to take such other and further action as they, in their sole and exclusive discretion, shall deem necessary or appropriate to carry out the purposes and intent of the foregoing resolutions; and that any actions previously taken by the officers of Bridge Bank which are consistent with the foregoing resolutions shall be, and hereby are, ratified, approved, confirmed and adopted as the act and deed of Bridge Bank; and

FURTHER RESOLVED that the Successor Welfare Plans and Successor Welfare Trust, a copy of said Successor Welfare Plans and Successor Welfare Trust having been presented to the Board at this meeting, be and they hereby are approved and adopted, and the President of Bridge Bank and any officer designated by the President be, and hereby are, authorized to execute said Successor Welfare Plans and Successor Welfare Trust, and to take or cause to be taken such other actions in the name and on behalf of Bridge Bank, including the amendment of said Successor Welfare Plans and Successor Welfare Trust, as in the judgment of said officer shall be necessary, desirable or appropriate to (i) effect the adoption of said Successor Welfare Plans and Successor Welfare Trust, (ii) clarify or interpret said Successor Welfare Plans and Successor Welfare Trust, or (iii) obtain and maintain their continuing qualification under applicable sections of the Internal Revenue Code of 1986, as amended, and all other applicable laws and regulations; and the President of Bridge Bank and any officer designated by the President are further authorized to effect the withdrawal from the Welfare Plans and Trust at such time as is appropriate with no gap or lapse in coverage under the Welfare Trust and the Successor Welfare Plans and Successor Welfare Trust; and

FURTHER RESOLVED, that Bridge Bank hereby adopts the following benefit plans for its employees with the same benefits, coverages, conditions, restrictions, limitations, and terms as provided by MCorp and the Failed Banks to their employees immediately prior to March 28, 1989, with the effective date of such benefit plans for Bridge Bank being the date of termination of coverage to the employees of Bridge Bank under the MCorp benefit plans; the benefit plans adopted by Bridge Bank are: group medical, employee group term life insurance, long-term disability, business travel accident insurance, voluntary accidental death and

dismemberment, family life insurance, group dental, vacation and sick pay and short-term disability; and

FURTHER RESOLVED that Robert G. Davis, Bobby L. Doxey, Randy A. Graham, R. Philip Kenny, and Stephen M. Samford be and they hereby are appointed to act as members of the Committee to administer the Successor MoneyMax Plan and Successor Welfare Plans; and

FURTHER RESOLVED that Stephanie S. Burks be and hereby is appointed to act as Administrator of the Successor MoneyMax Plan and the Successor Welfare Plans; and

FURTHER RESOLVED that the President of Bridge Bank and any officer designated by the President be, and hereby are, authorized and directed to take or cause to be taken such further action, and execute and deliver, in the name and on behalf of Bridge Bank, such documents, instruments, certificates and instructions as said officer so acting may deem necessary, desirable or appropriate to effectuate the purposes of the foregoing resolutions.

IN WITNESS WHEREOF, I have hereunto affixed my name and the seal of the above organization, this 10th day of May , 1989.

/s/ illegible
Secretary (Title)

STATE OF TEXAS §
§
COUNTY OF DALLAS §

SUBSCRIBED AND SWORN TO BEFORE ME, this 10th day of May , 1989.

/s/ Donna M. Leavitt
Notary Public

Id/5924t

APPENDIX O

(Excerpts from Bridge Bank
Cafeteria Plan)

BRIDGE BANK CAFETERIA PLAN

BRIDGE BANK CAFETERIA PLAN

I N D E X

		Page
ARTICLE I	GENERAL	1
Section:		
1.1	Establishment of plan	1
1.2	Purpose	1
1.3	Tax Qualifications	1
1.4	Incorporation of Other Documents	1
1.5	Name of Plan	1
ARTICLE II	DEFINITIONS	2
Section:		
2.1	Administrator	2
2.2	Benefit	2
2.3	Benefit Dollers	2
2.4	Benefit Plan	2
2.5	Code	2
2.6	Committee	2
2.7	Company	2
2.8	Compensation	2
2.9	Compensation Committee	2
2.10	Daily Compensation	3
2.11	Default Benefits	3
2.12	Employee	3
2.13	Employer	3
2.14	ERISA	3
2.15	Flex Dollers	3
2.16	Minimum Benefits	3
2.17	Participant	3
2.18	Pay Conversion Dollers	3
2.19	Plan	3
2.20	Plan Year	3

2.21	Price Tag	3
2.22	Termination of Employment	3
ARTICLE III	ELIGIBILITY FOR PARTICIPATION	4
Section:		
3.1	Generally	4
3.2	New Employees	4
3.3	Termination of Employment	4
3.4	Additional Requirements	4
ARTICLE IV	FLEX DOLLERS	4
Section:		
4.1	Flex Dollers	4
4.2	Benefit Dollers	4
4.3	Pay Conversion	4
4.4	Excess Benefit Dollers	5
ARTICLE V	ELECTIVE BENEFITS UNDER THE PLAN	5
Section:		
5.1	Generally	5
5.2	Medical Benefits Plan	5
5.3	Supplemental Health Care Plan	6
5.4	Dental Benefits Plan	6
5.5	Dependent Care Plan	6
5.6	Employee Life Coverage Plan	7
5.7	Family Life Coverage Plan	7
5.8	Accidental Death Coverage Plan	7
5.9	Long-Term Disability Plan	7
5.10	Vacation	7
ARTICLE VI	MINIMUM BENEFITS	8
Section:		
6.1	Generally	8

	6.2	Medical Benefits 8
	6.3	Employee Life Insurance 8
	6.4	Long Term Disability 8
	6.5	Administrator Discretion 8
ARTICLE VII		ELECTION PROCEDURES AND DEFAULT BENEFITS 8
Section:		
	7.1	Generally 8
	7.2	Forms and Procedures 8
	7.3	Acceptance of Elections 8
	7.4	Revocation of Elections 9
	7.5	Default Benefits 10
ARTICLE VIII		ADMINISTRATIVE PROVISIONS 10
Section:		
	8.1	Appointment of the Committee and the Administrator 10
	8.2	Administrator's Duties 10
	8.3	Resignation or Removal of Administrator 11
	8.4	Duties and Powers of Committee 11
	8.5	Claims Procedures 12
	8.6	Rules and Decisions 12
	8.7	Organization 12
	8.8	Indemnification 12
	8.9	Directions Regarding Benefits 12
	8.10	Named Fiduciaries and Allocations of Responsibility 12

ARTICLE IX — FUNDING 13

Section:

9.1 No Obligation to Insure or Fund Benefits 13
9.2 Insured Benefits 14
9.3 Benefit Funded Through Trust 14
9.4 Non-Insured, Non-Funded Benefits 14
9.5 No-Interest Obligation 14

ARTICLE X — AMENDMENTS; ADOPTION; WITHDRAWAL; OBLIGATIONS OF EMPLOYER 14

10.1 Amendments or Termination 14
10.2 Adoption of Plan by Employers . . .14
10.3 Obligations of Employer 15
10.4 Withdrawal 15

ARTICLE XI — MISCELLANEOUS 16

Section:

11.1 No Employment Contract 16
11.2 No Assignment 16
11.3 Choice of Law 16
11.4 Severability 16
11.5 Gender, Singular and Plural References 16

BRIDGE BANK CAFETERIA PLAN

ARTICLE I

GENERAL

1.1 *Establishment of Plan.* This instrument establishes the Bridge Bank Cafeteria Plan, which is a successor plan to the MCorp Cafeteria Plan (the "MCorp Plan"), which was originally effective as of July 1, 1984. The Deposit Insurance Bridge Bank, National Association ("Bridge Bank") has continued as a participating employer in the MCorp Plan since its inception on March 28, 1989, as successor to various national banking associations which were previously participating employers in the MCorp Plan. Effective as of the date of withdrawal from the MCorp Plan by Bridge Bank pursuant to the provisions of Section 10.4 hereof, all benefits provided for employees of Bridge Bank under the MCorp Plan will be continued under this Plan, with no gap or lapse in time between coverage under the MCorp Plan and coverage under this Plan.

1.2 *Purpose.* The purpose of this Plan is to furnish Employees of the Employers with choices among various employee benefits or cash compensation. The Employers recognize that the employee benefit needs of individual Employees differ, depending on the age, salary and number of dependents of the Employee, and the Employers desire to permit Employees to select and tailor the benefits they receive in a manner calculated to best meet their particular needs. The Employers further desire to permit their Employees to choose, to the extent permitted by applicable law, between taxable and nontaxable compensation.

1.3 *Tax Qualification.* This Plan is intended to qualify as a non-discriminatory cafeteria plan under Section 125 of the Code. Accordingly, this Plan shall be interpreted and construed in accordance with Code Section 125, the regulations issued thereunder, and any other published judicial or administrative interpretations thereof.

1.4 *Incorporation of Other Documents.* The Benefit Plans offered under this Plan may be the subjects of separate plan documents, trust agreement, insurance or administrative services contracts. Any such other plan documents, trusts or contracts are incorporated herein by reference.

1.5 *Name of Plan.* This Plan shall be referred to as the "Bridge Bank Cafeteria Plan."

ARTICLE II

DEFINITIONS

2.1 *"Administrator"* means the person appointed by the Committee to act as administrator of the Plan and to perform the duties described in Article VIII.

2.2 *"Benefit"* means any of the benefits which may be purchased or are required to be purchased under this Plan, as enumerated in Articles V and VI of this Plan

. . . .

2.4 *"Benefit Plan"* refers to the specific terms and conditions regarding a Benefit which may be purchased under this Plan, including the terms and conditions of any separate plan document, trust agreement, insurance or administrative services contract regarding such Benefit. The provisions of

this Plan regarding Benefit Plans covered by a separate document are intended only as a descriptive summary, and in case of any conflict between this Plan and a separately documented Benefit Plan, the latter shall control.

2.5 *"Code"* means the Internal Revenue Code of 1986, as amended.

2.6 *"Committee"* means the Benefits Committee which administers this Plan, as appointed under Section 8.1 of this Plan.

2.7 *"Company"* means The Deposit Insurance Bridge Bank, National Association, or its successor.

. . . .

2.12 *"Employee"* means any person rendering services to an Employer for remuneration which is subject to federal income tax withholding and FICA taxes.

2.13 *"Employer"* means each corporation or business enterprise which adopts this Plan or is deemed to adopt this Plan pursuant to Section 10.2 of this Plan.

2.14 *"ERISA"* means the Employee Retirement Income Security Act of 1974, as amended from time to time.

. . . .

2.17 *"Participant"* means an Employee who meets the eligibility requirements for participation as set forth in Article III of this Plan and who elects, or is deemed to elect, Benefits under this Plan.

. . . .

2.19 *"Plan"* means the Bridge Bank Cafeteria Plan, as amended from time to time.

. . . .

2.22 *"Termination of Employment"* means the termination of a Participant's employment with an Employer, whether by reason of discharge, voluntary termination, disability, retirement, or death. "Termination of Employment" shall not include the transfer of a Participant from one Employer to another Employer.

ARTICLE III

ELIGIBILITY FOR PARTICIPATION

3.1 *Generally.* All full-time Employees of an Employer shall be eligible to participate in the Plan immediately on their first day of employment. An Employee is a full-time Employee for purposes of this Article if he is regularly scheduled to work forty (40) hours or more per week.

3.2 *New Employees.* Full-time employees whose active, full-time employment commences after such date specified by the Administrator each calendar year shall not be eligible to elect vacation days for the Plan Year beginning on January 1 of the next calendar year.

3.3 *Termination of Employment.* Except to the extent a Benefit Plan provides otherwise, each Participant's eligibility to participate in this Plan and his coverage under each Benefit Plan shall terminate on the date of the Participant's Termination of Employment.

3.4 *Additional Requirements.* The Benefit Plans incorporated in this Plan may have their own eligibility requirements for participation. The eligibility rules of this Plan are in addition to any such eligibility rules.

. . . .

ARTICLE V

ELECTIVE BENEFITS UNDER THE PLAN

5.1 *Generally.* Subject to the requirements of Article VI of this Plan regarding Minimum Benefits and Article VII of this Plan regarding elections, and subject to the Committee's discretion to reduce the maximum coverage under any Benefits Plan and the Company's right to alter, amend or terminate any Benefit Pla, each Participant may elect to purchase any of the Benefits set forth in this Article at Price Tag as determined by the Administrator.

5.2 *Medical Benefits Plan.* The Medical Benefits Plan provides medical coverage at optional levels for the Participant and his family, including both spouse and children. A Participant may elect one of the options provided under the Medical Benefits Plan or no coverage thereunder for any Plan Year; provided, however, that an election of no coverage will reduce the Participant's Benefit Dollars by an amount equal to the number of Benefit Dollars which the Participant was entitled to receive for medical coverage under the provisions of Section 4.2. For each Plan Year, the Administrator may in his discretion establish different coverage options. The Price Tag for each Medical Benefits Plan option will vary depending on family status category and the level of coverage elected. The Price Tags will be determined annually and will represent an actuarially derived estimate of the actual cost of providing annual

coverage under the Medical Benefits Plan. Participants will be notified of the Price Tag of each option for a Plan Year at the beginning of the enrollment period for the Plan Year.

5.3 *Supplemental Health Care Plan.* The Supplemental Health Care Plan will provide reimbursements to each Participant for qualifying medical expenses of the Participant, and/or his spouse or dependents, if applicable, which are not covered by the Medical Benefits Plan or by insurance. A Participant may elect no coverage or may elect any whole dollar amount of coverage as specified by the Administrator under the Supplemental Health Care Plan for a Plan Year. A Participant whose coverage under the Supplemental Health Care Plan commences later than the first day of a Plan Year shall be limited to an amount of coverage for such Plan Year equal to the specified maximum multiplied by a fraction, the numerator of which is the remaining number of pay periods in the Plan Year after such Participant's coverage begins, and the denominator of which is the total number of pay periods in such Plan Year. The Price Tag for the Supplemental Health Care Plan is equal to the dollar amount of coverage the Participant elects for the Plan Year.

5.4 *Dental Benefits Plan.* A Participant may elect no coverage or may elect coverage at optional levels for the Participant and his family, including both spouse and children. The Administrator may in his discretion establish different coverage options. The Price Tag for the Dental Benefits Plan will vary depending on the family status category elected. The Price Tags will be determined annually and will represent an actuarially derived estimate of the actual cost of providing coverage under the Dental Benefits Plan. Participants will be notified of the Price Tag of each option for a Plan Year at the beginning of the enrollment period for the Plan Year.

5.5 *Dependent Care Plan.* The Dependent Care Plan provides reimbursements for certain services rendered for the care of the Participant's child or children under the age of thirteen (13) years or for the Participant's spouse or dependent who is incapable of self-care. A Participant may elect no coverage or may elect any whole dollar amount of coverage as specified by the Administrator under the Dependent Care Plan for each Plan Year. A Participant whose coverage under the Dependent Care Plan commences later than the first day of a Plan Year shall be limited to an amount of coverage for such Plan Year equal to the specified maximum multiplied by a fraction, the numerator of which is the remaining number of pay periods in the Plan Year after such Participant's coverage begins, and the denominator of which is the total number of pay periods in such Plan Year. The Price Tag for the Dependent Care Plan is equal to the dollar amount of coverage elected by the Participant for the Plan Year.

5.6 *Employee Life Coverage Plan.* Each Participant may elect coverage on his own life in any of the coverage amounts offered. For each Plan Year, the Administrator may in his discretion establish different coverage options. The Price Tag of each option represents the premium for providing coverage for the Play Year, determined annually by the Administrator. The Price Tags will be announced to all Participants at the beginning of the enrollment period for each Plan Year.

5.7 *Family Life Coverage Plan.* Each participant may elect no coverage, or may elect coverage on the life of his spouse and/or children from among such options as are approved by the Administrator. For each Plan Year, the Administrator may in his discretion establish different coverage options. The Price Tag for each Family Life Coverage option represents the premium for providing

coverage for the Plan Year, determined annually by the Administrator. The Price Tags will be announced to the Participants at the beginning of the enrollment period for each Plan Year.

5.8 *Accidental Death Coverage Plan.* The Accidental Death Coverage Plan provides benefits in the event of accidental death or dismemberment of the Participant and, if applicable, his spouse and children. Each Participant may elect no coverage or may elect among such options as the Administrator approves. The Price Tag of each Accidental Death Coverage option represents the premium for providing coverage for the Plan Year, determined annually by the Administrator. The Price Tags will be announced to Participants at the beginning of the enrollment period for each Plan Year.

5.9 *Long-Term Disability Plan.* The Long-Term Disability Plan provides benefits, offset by Social Security and certain other benefits, in the event of the Participant's total disability. The coverage options under the Long-Term Disability Plan are annually established by the Administrator. The Price Tag for each coverage option under the Long-Term Disability Plan represents an estimate of the actuarial cost of providing coverage for the Plan Year, determined annually. The Price Tags will be announced to Participants at the beginning of the enrollment period for each Plan Year.

. . . .

ARTICLE VI

MINIMUM BENEFITS

6.1 *Generally.* Each Participant who elects to purchase Benefits under this Plan must purchase with his

Benefit Dollars at least the Minimum Benefits set forth in this Article.

6.2 *Medical Benefits.* Each Participant may elect no coverage; however, he shall forfeit the portion of his Benefit Dollars calculated with reference to the Price Tag for the Medical Benefits Plan if he waives coverage.

6.3 *Employee Life Insurance.* Each Participant is required to elect at least the smallest amount of coverage offered.

6.4 *Long-Term Disability.* Each Participant must elect at least the smallest amount of coverage offered.

6.5 *Administrator Discretion.* The Administrator may, in his discretion, prescribe different Minimum Benefits for any Plan Year.

. . . .

ARTICLE VIII

ADMINISTRATIVE PROVISIONS

8.1 *Appointment of the Committee and the Administrator.* The Committee shall mean the Benefits Committee consisting of at least three (3) members appointed by the Compensation Committee, if any, or by the Board of Directors of the Company. The Committee shall appoint an Administrator who shall administer the Plan and carry out the duties specified in Section 8.2 hereof, and who may, but need not be, a member of the Committee. The Administrator and each member of the Committee shall serve for a term of one year or until his successor is appointed. The Administrator and each member of the Committee may

serve for more than one term. All expenses of the Administrator and the Committee shall be paid by the Employers. The Administrator and any member of the Committee who is an Employee of an Employer shall not receive any additional compensation with respect to his services as Administrator or as a member of the Committee.

8.2 *Administrator's Duties.* The Administrator shall mean the person appointed pursuant to Section 8.1 hereof. The Administrator shall exercise such authority and responsibility as the Administrator deems appropriate to comply with the provisions of federal law and regulations issued thereunder and to carry out any duties delegated to the Administrator in writing by the Committee. The Administrator shall be the designated agent for service of legal process. The Administrator shall cause the fiduciaries to be bonded to the extent required by law or directed by the Committee.

8.3 *Resignation or Removal of Administrator.* An acting Administrator may resign upon thirty (30) days prior written notice to the Committee. The Committee may remove any Administrator by giving thirty (30) days written notice in advance to the acting Administrator. In the event of the resignation or removal of an Administrator, the Committee shall appoint a successor Administrator if the Company intends to continue the Plan. During any period in which selection of an Administrator is pending, the Committee shall act as Administrator.

8.4 *Duties and Powers of Committee.* Except to the extent a Benefit Plan provides otherwise, the Committee shall have such duties and powers as may be necessary to administer this Plan, including, but not by way of limitation, the following:

(a) To construe and interpret the Plan, and decide all questions of eligibility;

(b) To prescribe procedures to be followed by Participants in making elections under the Plan and in filing claims under the Plan;

(c) To prepare and distribute information explaining the Plan to Participants;

(d) To receive from Employers and from Participants such information as shall be necessary for the proper administration of the Plan;

(e) To furnish the Company and Employers such annual reports with respect to the administration of the Plan as are reasonable and appropriate;

(f) To keep reports of elections, claims, and disbursements for claims under the Plan;

(g) To appoint individuals or committees to assist in the administration of the Plan and to engage any other agents it deems advisable, including legal and actuarial counsel;

(h) To purchase any insurance deemed necessary for providing Benefits under this Plan;

(i) To accept, modify or reject elections under the Plan;

(j) To promulgate election and claims forms to be used by Participants;

(k) To prepare and file any reports or returns with respect to the Plan required by ERISA, the Code or any other laws; and

(l) To fulfil such other duties or exercise such other powers as are set forth in any Benefit Plan.

Neither the Committee nor the Administrator shall have the power to amend or terminate this Plan.

8.5 *Claims Procedures*. The Committee will be responsible for making all determinations as to the rights of any Participant or any beneficiary of a Participant to receive amounts under the Plan except to the extent a Benefit Plan provides to the contrary. The Committee may prescribe forms and procedures for making claims for Benefits under the Plan to the extent such forms or procedures are not prescribed by the terms of a Benefit Plan. Any denial by the Committee of a claim for benefits under the Plan shall be stated in writing by the Committee, setting forth specific reasons for the denial. The Committee shall afford a reasonable opportunity to any Participant or beneficiary whose claim for Benefits has been denied for a review of the decision of the Committee denying the claim.

8.6 *Rules and Decisions* The Committee and the Administrator may adopt such rules and procedures as they deem necessary, desirable or appropriate. All rules and decisions of the Committee and the Administrator shall be

uniformly and consistently applied to all Participants in similar circumstances. When making any decision or determination, the Committee and the Administrator shall be entitled to rely upon such information as may be furnished by an Employee, a Participant, an Employer, legal counsel, or the administrator of any Benefit Plan which is subject to this Plan. Whenever, in the administration of the Plan, any discretionary action by the Committee or the Administrator is required, the Committee and the Administrator shall each exercise its authority in a nondiscriminatory manner so that all persons similarly situated will receive substantially the same treatment.

8.7 *Organization.* The Committee may act at a meeting or in writing without a meeting. The Committee may adopt such by-laws and regulations as it deems desirable. Records shall be kept of all the Committee's meetings. All decisions of the Committee shall be made by a majority vote of its members.

8.8 *Indemnification.* The Committee and the Administrator shall be indemnified by the Employers against any and all liabilities arising by reason of any act or failure to act in good faith pursuant to the provisions of the Plan, including expenses reasonably incurred in the defense of any claim relating thereto.

8.9 *Directions Regarding Benefits.* Except to the extent a Benefit Plan provides otherwise, the Committee shall issue directions to each Employer concerning all amounts which are to be paid from the Employer's general assets under the Pla; the Committee shall issue directions to any insurer concerning any amounts to be paid by an insurer pursuant to the Plan; and the Committee shall issue directions to the trustee of any trust established to fund Benefits

concerning any amounts to be paid by such trustee pursuant to the Plan.

8.10 *Named Fiduciaries and Allocation of Responsibility.* ERISA requires that certain persons, who are deemed to be "fiduciaries" as defined in Section 3(21)(A) of ERISA, be designated as "Named Fiduciaries" in the Plan. The Committee and the Administrator are hereby designated Named Fiduciaries. Each Named Fiduciary shall have only the powers, duties and responsibilities specifically allocated to such fiduciary pursuant to the terms of this Plan. The Compensation Committee, if any, and the Board of Directors of the Company shall not have any power or fiduciary responsibility hereunder other than the power to name the persons who shall comprise the Committee and continuing the allocation of who shall comprise the Committee and continuing the allocation of fiduciary responsibilities to those persons. Each Named Fiduciary may, by written instrument, allocate some or all of such Named Fiduciary's responsibilities to another fiduciary or designate another person to carry out some or all of such Named Fiduciary's fiduciary responsibilities. The Committee and each other fiduciary (specifically including the administrator or insurer of any Benefit Plan) to whom responsibilities are allocated by a Named Fiduciary will be furnished a copy of the Plan and their acceptance of such responsibility will be made by agreeing in writing to act in the capacity designated. No Named Fiduciary shall be liable for an act or omission of any person (who is allocated a fiduciary responsibility or who is designated to carry out such responsibility) in carrying out a fiduciary responsibility except to the extent that the Named Fiduciary did not act in accordance with the standard contained in Section 404(a) of ERISA with respect to the allocation or designation, continuation thereof, or implementation or establishment of the allocation or designation procedures. Any person or

group of persons may serve in more than one fiduciary capacity with respect to the Plan.

ARTICLE IX

FUNDING

9.1 *No Obligation to Insure or Fund Benefits*. The Employers shall have no obligation, but shall have the right, to insure any Benefits under this Plan or to establish any fund or trust for the payment of Benefits under this Plan.

9.2 *Insured Benefits*. In the case of any Benefit which is insured by an insurance company, any Benefits accruing shall be paid solely by such insurance company, and the Employers shall have no responsibility for the payment of such Benefits.

9.3 *Benefit Funded Through Trust*. In the case of any Benefits which is funded through contributions to a trust, any Benefits accruing shall be payable solely out of the assets of such trust, and the Employers shall have no responsibility for the payment of such Benefits beyond the Employees' contributions to such trust.

9.4 *Non-Insured, Non-Funded Benefits*. Payments of all Benefits under this Plan with respect to each Employee which are not insured or funded through a trust shall be made solely out of the general assets of such Employee's Employer.

9.5 *No-Interest Obligation*. The Employers shall have no obligation to refund or pay interest on any Participant's Flex Dollars.

ARTICLE X

AMENDMENTS; ADOPTION; *WITHDRAWALS; OBLIGATIONS OF EMPLOYERS*

10.1 *Amendments or Termination*. The Company expects the Plan to be permanent, but reserves the sole right to alter, amend or terminate this Plan in whole or in part at any time it determines to be appropriate. The Company may amend, alter, or terminate this Plan retroactively in its discretion. The Company shall act through the Compensation Committee, if any, or through any party properly authorized to so act by Board resolution. In the event of termination of the Plan by the Company, all benefit claims incurred prior to the termination and covered under a Benefit Plan shall be paid by the Company.

10.2 *Adoption of Plan by Employers*. The Company and any corporation or business enterprise, now in existence or hereafter formed, which is or becomes affiliated with the Company may, with the consent and approval of the Compensation Committee, if any, or the Board of Directors of the Company, and through action of such corporation's or enterprise's Board of Directors or other governing authority (or through action of an officer or committee duly authorized or ratified by such corporation's or enterprise's Board of Directors or other governing authority), adopt this Plan or any Benefit Plan hereunder for its Employees. Adoption of this Plan shall constitute adoption of all Benefit Plans hereunder, unless resolutions of the Compensation Committee, if any, or of the Board of Directors of the Company, and of the Board of Directors or other governing authority of the adopting Employer provide otherwise. Any such corporation or enterprise adopting this Plan shall be referred to as an "Employer."

The Administrator may negotiate specific changes and variations in the terms of this Plan or of any Benefit Plan hereunder, which shall be applicable to a particular Employer and may negotiate any terms, conditions or other matters regarding the adoption of this Plan by an Employer. The adoption and any changes or variations in terms of this Plan or of any Benefit Plan hereunder shall be set forth in an adoption agreement which shall be approved by the Board of Directors or other governing authority of the Employer (or by an officer or committee duly authorized by the Employer's Board of Directors or other governing authority) and shall be ratified by resolution of the Compensation Committee, if any, or of the Board of Directors of the Company.

Throughout this document, a distinction is purposefully drawn between the rights and duties of the Company and the rights and duties of the Employers. Those rights and duties specified as belonging to the Company shall be exercised exclusively by the Company.

10.3 *Obligations of Employer.* Each Employer shall pay any amounts necessary to fund or insure any Benefits hereunder for its Employees. Each Employer shall pay any unfunded, uninsured Benefits of its Employees. Each Employer shall keep such records and furnish such information with respect to its Employees as the Committee shall require. Each Employer may be required to pay its pro rata share of the costs of administering this Plan and Benefit Plans hereunder.

10.4 *Withdrawal.* Any Employer by action of its Board of Directors or other governing authority and notice of at least thirty (30) days to the Board of Directors of the Company and to the Committee may withdraw from the Plan at any time without affecting other Employers not

withdrawing. A withdrawing Employer may arrange for the continuation by itself or its successor, of the Plan in separate form for its own Employees, with such amendments, if any, as it may deem proper. The Company may, in its absolute discretion, terminate an Employer participation at any time when in its judgment such Employer fails or refuses to discharge its obligation under the Plan or under any Benefit Plan. Withdrawal from the Plan by an Employer or termination of the Employer's participation by the Company shall not affect the continued operation of the Plan with respect to the Company and other Employers.

ARTICLE XI

MISCELLANEOUS

11.1 *No Employment Contract*. Nothing contained in this Plan shall be construed as a contract of employment between any Employer and any Employee, nor as a guarantee of any Employee to be continued in the employment of an Employer nor as a limitation on the right of an Employer to discharge any of its Employees with or without cause.

11.2 *No Assignment*. A Participant's rights, interests or Benefits under this plan shall not be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, charge, garnishment, execution or levy of any kind, either voluntary or involuntary, prior to being received by the persons entitled thereto under the terms of a Benefit Plan or this Plan, and any such attempt shall be void.

11.3 *Choice of Law*. This Plan shall be construed, administered and governed in all respects under applicable federal law, including, without limitation, the provisions of ERISA and the Code and relevant interpretations thereof, and

to the extent not preempted by federal law, under the laws of the State of Texas.

11.4 *Severability*. If any provision of this Plan shall be held by a court of competent jurisdiction to be invalid or unenforceable, the remaining provisions hereof shall continue to be fully effective.

11.5 *Gender, Singular and Plural References*. References in this Plan to one gender shall include both genders, singular references shall include the plural, and plural references shall include the singular, unless the context clearly requires otherwise.

IN WITNESS WHEREOF, The Deposit Insurance Bridge Bank, National Association, has caused this instrument to be executed and attested, in a number of original counterparts, each of which shall be taken to be an original and all collectively but one instrument this 5th day of May, 1989, effective as stated herein.

THE DEPOSIT INSURANCE BRIDGE BANK, NATIONAL ASSOCIATION

By: /s/ Gloria R. Marr
GLORIA R. MARR
Secretary To The Board

ATTEST:

/s/ illegible

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared Gloria R. Marr , Secretary of THE DEPOSIT INSURANCE BRIDGE BANK, NATIONAL ASSOCIATION, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity stated, and as the act and deed of said national banking association.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 5th day of May , 1989.

/s/ Donna M. Leavitt
Notary Public in and for
The State of Texas

(SEAL)

My Commission Expires: 2-16-91

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APPENDIX P

BRIDGE BANK EMPLOYEES' BENEFICIARY ASSOCIATION TRUST AGREEMENT

BRIDGE BANK EMPLOYEES' BENEFICIARY ASSOCIATION TRUST AGREEMENT

THIS TRUST AGREEMENT made and entered into as of March 28, 1989, by and between THE DEPOSIT INSURANCE BRIDGE BANK, N.A., a national banking association with its principal place of business in the City and County of Dallas, State of Texas (the "Company"), and THE DEPOSIT INSURANCE BRIDGE BANK, N.A. a national banking association with its principal place of business in the City and County of Dallas, State of Texas ("DIBB"), as trustee;

WITNESSETH:

WHEREAS, the Company has established various welfare plans (said plans as they presently exist being incorporated herein by reference as fully as if set out in full herein and, together with any amendments thereto hereafter made, being hereinafter referred to as the "Plans") for the benefit of eligible employees of the Company and any affiliate adopting or other organization continuing such Plans pursuant to their terms (hereinafter "adopting organization"). The Plans are successor plans to various welfare plans of MCorp (the "MCorp Plans"). The Company has continued as a participating employer in the MCorp Plans since its inception on March 28, 1989, as successor to various national banking associations which were previously participating employers in the MCorp Plans. Effective as of the date of withdrawal from the MCorp Plans by Bridge Bank, pursuant to the terms of said MCorp Plans, all benefits provided for employees of the Company under the MCorp Plans are continued under the Plans, with no gap or lapse in time between coverage under the MCorp Plans and coverage under the Plans; and

WHEREAS, the Company has continued as a participating employer under the MCcorp Employees' Beneficiary Association Trust Agreement (the "MCorp Trust") since its inception on March 28, 1989, as successor to various national banking associations which were previously participating employers under the MCorp Trust; and

WHEREAS, concurrent with its adoption of the Plans, the Company desires to establish a trust in the form of this Trust with DIBB as trustee (the "Trustee"), to which contributions may be made by the Company, any adopting organization, and eligible employees, and from which payments may be made to or for the benefit of such Employees, their beneficiaries or estates pursuant to the Plans, said trust to be a successor trust to the MCorp Trust, with no gap or lapse in tie between the MCorp Trust and the trust established hereunder; and

WHEREAS, the Plans and this Trust Agreement have been duly authorized by the Board of Directors of the Company, and are intended to qualify under Section 501(c)(9) and other applicable sections of the Code;

NOW, THEREFORE, in consideration of the premises, the Company and the Trustee hereby agree to establish a trust in the form of this trust agreement, effective as of the date of withdrawal from the MCorp Plans by Bridge Bank, pursuant to the terms of said MCorp Plans, which shall read as follows:

ARTICLE I

It is intended that this trust agreement, together with the Plans, constitute a "voluntary employees' beneficiary association" within the meaning of the Code. For purposes

of this trust agreement, the following expressions shall have the meanings respectively indicated unless the context clearly requires otherwise:

1.01 *Affiliate*: Any national banking association, state banking corporation, business corporation, joint venture, trust, association or other business enterprise which the Company directly or indirectly controls. As used in this Section 1.01, the term "control" means the ownership of more than fifty percent (50%) of the voting stock and of the equity interest of any such entity and ownership of at least eighty percent (80%) of the voting stock and of the equity interest of any such entity in a chain of ownership from such fifty percent (50%) owned entity.

1.02 *Beneficiary*: Any dependent of a Participant who is entitled to receive benefits under the terms of the Plans or any other person who has been selected by a Participant, in accordance with the provisions of the Plans, to receive death benefits or other Plan benefits that may be payable to a person other than the Participant.

1.03 *Board of Directors*: The Board of Directors of the Company, as from time to time constituted.

1.04 *Bridge Bank*: The Deposit Insurance Bridge Bank, N.A., a national banking association with its principal place of business in Dallas, Texas.

1.05 *Code*: The Internal Revenue Code of 1986, as amended from time to time.

1.06 *Committee*: The group of individuals appointed under the Plans to administer the Plans.

1.07 *Company*: The Deposit Insurance Bridge Bank, N.A., a national banking association with its principal place of business in Dallas, Texas, or any successor corporation that succeeds as the sponsor of the Plans, whether by operation of law as a result of a corporate reorganization that causes such successor corporation to acquire the rights and assume the obligations of the Company or by reason of an agreement whereby such successor corporation replaces the Company as the sponsor of the Plans.

1.08 *Employer*: The Company and any Affiliate of the Company, or the successor thereof, having employees participating in the Plans at any given time.

1.09 *ERISA*: The Employee Retirement Income Security Act of 1974, as amended from time to time.

1.10 *Participant*: Any employee of an Employer or any other person who becomes a participant under the Plans but only with respect to the specified benefits as to which such person is a participant.

1.11 *Plans*: Various welfare plans of Bridge Bank, as presently in effect or as amended from time to time and evidenced by such agreements with contract administrators and such other documents as the Company may adopt from time to time for the purpose of providing benefits described in Section 501(c)(9) of the Code.

1.13 *Trust Fund*: All assets of whatsoever kind or nature from time to time held by the Trustee pursuant to this trust agreement. While such assets may be commingled for investment purposes, they shall be separately accounted for and separately available for use in providing only specified benefits for a specified class of Participants and Beneficiaries

to the extent required under the Plans and this trust agreement, in accordance with instructions of the Committee to the Trustee or, in the absence of such instructions, as determined by the Trustee on the basis of the aid and assistance provided by the actuaries for the Plans.

1.14 *Trustee*: The Deposit Insurance Bridge Bank, N.A., a national banking association, or any successor thereto who may be acting as trustee hereunder at the time in question.

Words used in this trust agreement in the singular shall include the plural and in the plural the singular, and the gender of words used shall be construed to include whichever may be appropriate under any particular circumstances of the masculine, feminine or neuter genders.

ARTICLE IV

4.01 *Trust Fund for Exclusive Benefit of Participants*: Notwithstanding anything to the contrary contained in this trust agreement, or in any amendment thereto, it shall be impossible, at any time, for any part of the Trust Fund to be recoverable by an Employer, or to be used for, or diverted to, purposes other than for the exclusive purpose for providing benefits to Participants, former Participants, or their Beneficiaries in accordance with the terms of the Plan and this trust agreement, except that taxes and expenses of administration may be paid from the Trust Fund as provided herein, and, in addition, a contribution of an Employer which is made by reason of a mistake of fact may, at the direction of the Committee, be returned to such Employer within one year after its payment. No part of the net earnings of the Trust Fund shall inure to the benefit of any private shareholder, creditor or individual.

ARTICLE V

5.05 *Standards of Conduct and Liabilities of Trustee*: The Trustee shall perform all of its duties hereunder with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, or in accordance with such other standards as may, from time to time, or in accordance with such other standard as may, from time to time, be required by law. The Trustee shall not cause the trust to engage in a transaction if it knows or should know that such transaction directly or indirectly constitutes a prohibited transaction under Section 406 of ERISA, and shall not be liable for any conduct on its part which conforms to that standard, unless it knowingly participates in or knowingly undertakes to conceal an act or omission of another fiduciary of the Plan, with the knowledge that such act or omission is a breach of fiduciary responsibility, or knowing of a breach of fiduciary responsibility, the Trustee fails to make reasonable efforts under the circumstances to remedy the breach, or by failure to carry out its specific responsibilities, in accordance with such standard, it has enabled another fiduciary of the Plan to commit a breach.

ARTICLE VIII

8.01 *Committee Action*: The Trustee shall be fully protected in relying upon a certification by the Committee, signed by a majority of all the members thereof, or by any member designated by all such members to act for the Committee, or the secretary thereof, with respect to any instruction, direction or approval by the Committee, except that such secretary or individual member shall not be authorized to direct any distribution to himself, and the

Trustee shall be protected also in relying upon a certification by the Company as to the membership of the Committee as it then exists, including a specimen signature of each member and the secretary, and in continuing to rely upon such certification until a subsequent certification is filed with the Trustee, or in relying upon the certification by the Company as to the non-existence of the Committee and the consequent substitution of the president and the chief personnel officer of the Company, who may in such case act jointly or severally in lieu of the Committee, in all respects concerning the administration of the Plan under this trust agreement.

8.02 *Employer Action*: Unless the Plan provides otherwise, any action by the Company or an Employer hereunder, pursuant to the Plan or this trust agreement, shall be evidenced by a written instrument executed by the president or the chief personnel officer of the Company or the Employer or by any person authorized by said officers to take such action, and the Trustee shall be fully protected in acting in accordance with such written instrument or resolution delivered to it.

8.03 *Reliance on Written Instrument*: The Trustee shall be fully protected in acting upon any instrument, certificate, or paper believed by it to be genuine and to be signed or presented by the proper person or persons, and the Trustee shall be under no duty to make any investigation or inquiry as to any statement contained in any such writing but may accept the same as conclusive evidence of the truth and accuracy of the statements therein contained.

8.02 *Employer Action*: Unless the Plan provides otherwise, any action by the Company or an Employer hereunder, pursuant to the Plan or this trust agreement, shall be evidence by a written instrument executed by the president or the chief personnel officer of the Company or the

Employer or by any person authorized by said officers to take such action, and the Trustee shall be fully protected in acting in accordance with such written instrument or resolution delivered to it.

8.03 *Reliance on Written Instrument*: The Trustee shall be fully protected in acting upon any instrument, certificate, or paper believed by it to be genuine and to be signed or presented by the proper person or persons, and the Trustee shall be under no duty to make any investigation or inquiry as to any statement contained in any such writing but may accept the same as conclusive evidence of the truth and accuracy of the statement therein contained.

ARTICLE X

10.01 *Amendment of Trust Agreement*: This trust agreement may be amended at any time, and from time to time, by an instrument executed by the Company and the Trustee, and the provisions of any such amendment may be made applicable to the Trust Fund as constituted at the time of the amendment as well as to the part of the Trust Fund subsequently acquired, provided, however, that no amendment shall be made to Section 4.01 hereof if such amendment would violate the provisions of ERISA or the Code. Any such amendment shall, unless otherwise provided therein, become effective upon execution by both the Company and the Trustee. The Company shall act through the Compensation Committee, if any, of its Board of Directors, or through any party properly authorized to so act by Board resolution.

10.02 *Adoption by Other Employers*: Any Employer which is eligible to and does in fact adopt the Plan may adopt this trust by written instrument, duly executed by its president or its chief personnel officer, acknowledged and

delivered to the Trustee and the Committee. However, no such adoption of the Plan or this trust shall be necessary if the Plan does not require adoption by Employers, and the Trustee may rely on written instructions from the committee indicating that such adoption is not necessary and that the employees of a given Employer and certain other individuals are eligible to participate in the Plan.

ARTICLE XI

11.01 *Termination of Trust Fund*: This trust agreement and the trust created hereby may be terminated at any time by the Company, or the trust may be terminated, with respect to any other Employer, by its board of directors or its president or chief personnel officer, and upon such termination, or upon such dissolution or liquidation of any Employer in the event that a successor to the Employer by operation of law or by the acquisition of its business interests shall not elect to continue the Plan and this trust, the Trust Fund, with respect to such Employer, shall be paid out by the Trustee in the form of distributions to or for the benefit of Participants and Beneficiaries as and when directed by the Committee in accordance with the provisions of the Plan and Article III hereof. The Company shall act through the Compensation Committee, if any, of its Board of Directors, or through any party properly authorized to so act by Board resolution.

11.02 *Continuation by Employer's Successor*: Any corporation succeeding to the interest of an Employer by sale, transfer, consolidation, merger, or bankruptcy, may elect to continue this trust by adopting this trust agreement or by otherwise assuming the duties and responsibilities of the Plan and trust in accordance with the provisions of Section 10.02 hereof, or such corporation may establish a separate Plan and trust for the continuation of benefits for its

employees, in which event the trust assets, held on behalf of the employees of the prior Employer, shall be transferred to the trustee of the new trust.

ARTICLE XII

12.01 *Texas Law to Control*: Except where inconsistent with the express provision hereof, or where preempted by ERISA, the powers and duties of the Trustee and all questions of interpretations, construction, operation and effect of this instrument shall be governed by the laws of the State of Texas, and except for such matters as may arise under ERISA, the Trustee shall be liable to account only in the courts of that state. All contributions to the Trustee shall be deemed to take place in the State of Texas. Should any provision or provisions of this trust agreement be held invalid or illegal for any reason, such illegality or invalidity shall not affect the remaining provisions of this trust agreement, but shall be fully severable, and the trust agreement shall be construed and enforced as if such illegal or invalid provisions had never been inserted herein.

12.02 *Construction of Trust Agreement*: This trust is intended to qualify as a tax-exempt trust under Sections 501(a) and 501(c)(9) of the Code, and the provisions hereof shall be interpreted consistent with such intention. I and whenever, in good faith, the Trustee may be in doubt as to the proper construction or interpretation of this trust agreement, or any other question that may arise during the administration of the trust herein created, the Trustee is authorized to resolve all such doubts and questions in such manner as it may deem proper, without the necessity of resorting to a court for construction or instruction and all decisions so made shall be binding and conclusive on all person sever interested hereunder. In addition, the Trustee may apply to the Committee for instructions, directions,

authorization, or information, and the Trustee may demand assurances satisfactory to it that any action it is directed to take will not adversely affect the tax exemption of the trust; provided, however, that no such assurances shall be required if, in the opinion of counsel for the Company, such action does not adversely affect the tax exemption of the trust. This trust agreement shall be binding upon all persons who are ever entitled to any benefits hereunder, their heirs, executors, administrators and legal representatives, and upon Employers and their successors and assigns and upon the Trustee and its successors and assigns.

12.03 *Court Proceedings*: The Trustee may at any time initiate an action or proceeding for the settlement of accounts or for the determination of any question of construction which may arise or for instructions, and the only necessary parties defendant to such action shall be all Employers and the Committee, except that the Trustee may, if it so elects, bring in as parties defendant any other person or persons.

12.07 *Rights Determined from Entire Instrument*: This trust agreement, for convenience only, has been divided into articles and sections, but the rights, powers, duties, privileges, and other legal relationships shall be determined from this trust agreement as an entirety without regard to the division into articles and sections or to the headings prefixed to said sections.

12.08 *Execution and Counterparts*: This trust agreement shall be executed in any number of counterparts, each one of which shall be deemed to be an original although the others shall not be produced.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be executed by their duly authorized

officers in a number of copies, all of which shall constitute one and the same instrument, which may be sufficiently evidenced by any executed copy hereof, as of the 28th day of March 1989, effective as stated herein.

THE DEPOSIT INSURANCE BRIDGE BANK, N.A.
(the "Company")

By: /s/ R. Philip Kenny

ATTEST:

/s/ illegible

THE DEPOSIT INSURANCE BRIDGE BANK, N.A., Trustee

By: /s/ Toby Tripp

ATTEST:

/s/ illegible

STATE OF TEXAS §
§
COUNTY OF DALLAS §

Before me, the undersigned authority, on this day personally appeared R. Philip Kenny , Managing Director of THE DEPOSIT INSURANCE BRIDGE BANK, NATIONAL ASSOCIATION, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity stated, and as the act and deed of said national banking association.

Given under my hand and seal of office this 5th day of June , 1989.

/s/ Donna M. Leavitt
Notary Public in and for
the State of Texas

(SEAL)

My Commission Expires: 2-16-91

STATE OF TEXAS §
§
COUNTY OF DALLAS §

Before me, the undersigned authority, on this day personally appeared Toby Tripp , Officer of THE DEPOSIT INSURANCE BRIDGE BANK N.A., known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity stated, and as the act and deed of said national banking association.

Given under my hand and seal of office this 5th day of June , 1989.

/s/ Donna M. Leavitt
Notary Public in and for
the State of Texas

(SEAL)

My Commission Expires: 2-16-91

Id/6033t

APPENDIX Q

(Excerpts from Administrative Services)
(Agreement No. 85276 between)
(The Prudential Insurance Company of America)
(and)
(The Prudential Insurance Company of America)
(and)
(Deposit Insurance Bridge Bank, N.A.)
(Effective April 1, 1989)

IMPORTANT NOTICE REGARDING YOUR NEW CONTRACT OR CONTRACT AMENDMENT

The application for the group contract or the amendment forms attached to this notice should be signed promptly by an officer of your company and Prudential's copy returned as soon as possible Reasons for taking prompt action are described below.

A. ERISA

Most group contract holders having United States employees are subject to the obligations imposed on them by the Employment Retirement Income Security Act of 1974 (ERISA) Plans which are subject to ERISA must comply with certain reporting and reporting and disclosure requirements These requirements include the following:

1. Plan Documents

All plan documents including insurance contracts must be available for examination by plan participants.

2. Plan Memorandum

ERISA requires that every plan subject to the Act be in writing and accurately reflect all benefits under the Plan.

Most of our contract holders have complied with this requirement by preparing a written memorandum (see Section F of your ERISA Administration Guide) and incorporating the group contract into it by reference.

3. Summary Plan Description

A plan participant must receive a Summary Plan Description with 90 days of becoming a participant or within 120 days after the date the planis established. The Summary Plan Description must be up-to-date and reflect all the benefits of the plan as it existed not more than 120 days prior to the date they enter the plan.

Thereafter, a supplement or new Summary Plan Description must be distributed within 210 days after the end of the fifth plan year following the end of the period covered by the last distributed Summary Plan Description (or, if no plan changes within 210 days after the end of the term plan year following the end of the period covered by the last distributed Summary Plan Description)

The Summary Plan Description includes information on plan eligibility and the benefits provided under the plan. Refer to Section C of your ERISA Administration Guide for additiona information.

4. Notice of Plan Changes

Plan participants must receive notice of certain plan changes within seven months after the end of the plan year in which such changes is adopted. The Secretary of Labor must be notified of those changes within the same time period if you have filed a copy of your Summary Plan Description with the Department of Labor. The item which must be reported, when changed, are those which appear in the Summary Plan

Description. Refer to Sections B and C of your ERISA Administration Guide for additional information.

Since these documents either rely on the group contract for the description of the benefits or incorporate the group contract into them by reference, it is important to keep your group contract as complete and up-to-date as possible.

B. LITIGATION

As you are aware, there has been an increasing tendency to resort to litigation to resolve disputes in the event of litigation involving your benefit plan, your counsel should have a copy of the contract on a current basis in order to assist counsel in making decisions.

If you have any questions or would like further information, please do not hesitate to contact your Prudential Group Representative.

(Hand written memo)

Add the employees of Bridge Bank

eff 4/1/89 - 12/31/89

terminated 12/31/89

I Plan A $1500/ded

II Plan B 700 ded

III Plan C 150 ded.

ADMINISTRATIVE SERVICES AGREEMENT NO. 85276
effective April 1, 1989
between
THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA
(herein called Prudential)
and
DEPOSIT INSURANCE BRIDGE BANK, N.A.
(herein called the Purchaser)

WHEREAS, the Purchaser has a Plan of Benefits described in Exhibit A hereof (herein called the Plan) for the benefit of the classes of persons set forth in that Exhibit, and

WHEREAS, the Purchaser desires Prudential to furnish the services set forth in Exhibit B hereof (herein called the Services) with respect to the Plan,

NOW THEREFORE, the Purchaser and Prudential agree as follows:

Section 1. General Provisions

A. It is understood that the Purchaser retains all final authority and responsibility for the Plan and its operation and that Prudential is empowered to act on behalf of the Purchaser in connection with the Plan only as expressly stated in this Agreement or as mutually agreed to in writing by Prudential and the Purchaser.

B. The Purchaser agrees to hold Prudential and its directors, officers and employees harmless from any and all claims, lawsuits, settlements, judgm,ents, cost, penalties, and expenses, including attorney's fees, resulting from, or

arising out of or in connection with any function of Prudential under this Agreement, unless it is determined that the liability therefore was the direct consequence of criminal conduct or fraud on the part of Prudential or any of its directors, officers or employees.

Section II. Obligations of the Purchaser

A. The Purchaser shall have the obligation (1) to furnish any information required in accordance with Exhibit B when and as specified therein, (2) to establish and maintain any accounts and records required in accordance with that Exhibit, and (3) to furnish to Prudential such other information required by Prudential in order to provide the Services.

B. Prudential's performance of the Services will require prompt discharge by the Purchaser of such obligations. Therefore, Prudential shall not be considered to have failed to perform its obligations under this Agreement if any delay or non-performance is due, in whole or in part, to the Purchaser's failure to promptly discharge such obligations.

C. The Purchaser shall provide Prudential with the names of individuals, together with the scope of their authority, authorized to act for the Purchaser in connection with this Agreement.

D. In the event that the Federal Government or any state, province or other governmental body shall have assessed any tax against Prudential with respect to any feature of or transaction under the Plan or the ASO Agreement, including (without limiting the generality of the foregoing) any benefits payable or enrollment under the Plan or any services provided or fees payable under the ASO Agreement (but excluding any tax on income earned by Prudential), the Purchaser shall upon demand reimburse Prudential to the extent of such taxes plus any expenses incurred by Prudential in connection therewith, including (without limiting the generality of the foregoing) any penalties and/or interest assessed with such taxes.

Section III. Obligations of Prudential

A. Prudential will perform the Services set forth in Exhibit B on behalf of the Purchaser in connection with the Plan.

B. On the dates specified in Exhibit B, Prudential shall report to the Purchaser the amount of the charges for the Services performed since the date of the last such report.

C. Prudential shall furnish such other reports as are requested by the Purchaser in connection with this Agreement and are agreed to by Prudential.

D. Prudential shall maintain individual claim files and such other records as are needed to

perform the Services for two years following the year in which the Services are performed.

Section IV. Charges for the Services

A. Charges for the Services shall be in accordance with the Schedule of Charges set forth in Exhibit C. Charges shall be payable to Prudential by the Purchaser within thirty-one days after the billing date (the date on which Prudential releases a notice to the Purchaser requesting payment of the charges for the Services performed). If the Purchaser fails to remit such payment to Prudential within thirty-one days after the billing date, a Late Fee Charge, as described in Exhibit C shall be payable to Prudential. Also, at its option, Prudential may exercise its right to terminate this Agreement as discribed in Section V. A.

B. Prudential may change the Schedule of Charges as of any date (1) on or after the first anniversary of this Agreement's effective date, or (2) as a result of any modification of the Plan or this Agreement, or in any administrative procedure as requested by the Purchaser and agreed to by Prudential. If such a change is in connection with a modification of the Plan or this Agreement, or in a administrative procedure, it will become effective on the effective date of the modification.

If such a change is not in connection with a modification of the Plan or this Agreement, or in an administrative procedure, it will become effective on the date specified, provided Prudential has given notice of the change at least sixty days prior to such date of its intention to terminate this Agreement as of such date.

Section V. Termination of Agreement

A. This Agreement shall terminate at the expiration of the day prior to any anniversary of its effective date if either Prudential or the Purchaser has given at least thirty day's prior written notice to the other of its intention to terminate this Agreement as of that anniversary date. Furthermore, this Agreement shall terminate upon the first to occur of the following:

(1) The expiration of thirty days after written notice has been given by Prudential or the Purchaser of the other's breach of material obligations under this Agreement;

(2) The date specified in a written notice given by Prudential to the Purchaser of its intent to terminate this Agreement because of the Purchaser's failure to remit to Prudential charges for Services within thirty-one days from the date when due;

(3) Termination of the Plan;

(4) Modification of the Plan, but such modification of the Plan shall not operate to terminate this Agreement (a) if this Agreement is changed to make such modified plan the Plan under this Agreement or (b) while this Agreement is being continued, by mutual agreement between Prudential and the Purchaser, prior to such change therein

(5) The date a change in the Schedule of Charges is to become effective, in the event that the Purchaser notifies Prudential at least thirty days prior thereto of its intention to terminate this Agreement;

(6) The day following the third continuous day on which available funds in the depository bank are not sufficient to pay in full Automated Clearing House Debits received for processing in accordancc with the Claim Payment provisions of Exhibit B of this Agreement.

B. In the event of termination of this Agreement, no further claims services shall be furnished

by Prudential except as mutually agreed to by Prudential and the Purchaser.

C. In the event of such termination, Prudential shall continue to furnish claim payment services as to those claims for which it had complete information prior to the termination date at the same charges as were then in effect under this Agreement unless the Purchaser notifies Prudential in writing at the time of such termination that such services are not required by the Purchaser.

ADMINISTRATIVE SERVICES AGREEMENT

C. In the event of such termination, Prudential shall forward to the Purchaser a claim history extract summary or other records as the Purchaser may reasonably require for the administration of the Plan or any plan adopted in its place. Prudential may make a reasonable charge for furnishing these records.

Section VI. Miscellaneous Provisions

A. This Agreement, including its Exhibits, may be changed by an amendment hereto signed by the Purchaser and an officer of Prudential.

B. Any of the functions to be performed by Prudential under this Agreement may be performed by Prudential or any of its subsidiaries or affiliates, and reference in Section I to Prudential, its directors, officers and employees shall also include such an

affiliate or subsidiary, its directors, officers and employees.

By their signatures below, Prudential and the Purchaser agree that this Administrative Services Agreement is approved and its terms are accepted.

Date December 21, 1989

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

By Rollin L. Lacy

Date Feb. 10, 1990

-DEPOSIT INSURANCE BRIDGE BANK, NA -

Witness _____

By Candy Clarke Aldridge
(Signature and Title)

Agreement No. 85276
Effective Date: April 1, 1989

EXHIBIT A
OF ADMINISTRATIVE SERVICES AGREEMENT
between Prudential and the Purchaser

The term "Addendum" wherever used below refers to the document describing the Purchaser's Plan of Benefits" for the classes of persons indicated. The Plan of Benefits for each class of persons indicated is determined by: (1) the Addendum that applies to that class; and (2) any modification to that Addendum, provided the modification is included in an amendment to this Administrative Services Agreement.

Classes of Persons to Whom the Plan of Benefits Applies	*Applicable Plan of Benefits*
All active Employees and retired employees of the Purchaser.	Benefits for the expenses of a person's medical care as described in Addendum I Addendum II, or Addendum III of Exhibit A as elected by the Employee during the annual Edge enrollment period.

FILED
NOV 5 1993
OFFICE OF THE CLERK

NO. 93-342

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE MERCANTILE EMPLOYEES' BENEFICIARY ASSOCIATION TRUST and the WELFARE PLAN of the MERCANTILE EMPLOYEES' BENEFICIARY ASSOCIATION,

Petitioners,

v.

BANK ONE, TEXAS, N.A., formerly known as DEPOSIT INSURANCE BRIDGE BANK, NATIONAL ASSOCIATION, the WELFARE PLAN of the DEPOSIT INSURANCE BRIDGE BANK EMPLOYEES' BENEFICIARY ASSOCIATION, the DEPOSIT INSURANCE BRIDGE BANK BENEFICIARY ASSOCIATION TRUST, BANC ONE MORTGAGE COMPANY, TEXAS, formerly known as MBANK MORTGAGE COMPANY, MCORP, MCORP FINANCIAL, and MCORP MANAGEMENT,

Respondents.

On Petition for a Writ Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF FOR BANK ONE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals properly conducted a *de novo* review of unambiguous provisions in a written contract?

2. Whether the court of appeals correctly ordered dismissal of the case below where alternative relief in the form of instructions to a fiduciary had been sought, but necessary parties whose interests would be directly affected by such instructions had not been joined as parties?

3. Whether the stay of the district court judgment by the court of appeals can itself constitute reversible error and, if so, whether the stay was proper?

LIST OF ALL PARTIES

The following are parties to this proceeding:

1. Welfare Plan of the Mercantile Employees' Beneficiary Association

2. Jimmy F. Taylor and MCorp Management, Inc. have prosecuted this action at various times as the administrative committee for and on behalf of the MEBA Welfare Plan.

3. The Mercantile Employees' Beneficiary Association Trust

4. BANK ONE, Texas, N.A. (formerly known as Deposit Insurance Bridge Bank, National Association), a subsidiary of Banc One Corporation, but formerly owned by the Federal Deposit Insurance Corporation

5. Deposit Insurance Bridge Bank Employees' Beneficiary Association Trust

6. Welfare Plan of BANK ONE, Texas, Employees' Beneficiary Association

7. Banc One Mortgage Company (formerly known as MBank Mortgage Company)

8. MCorp, Inc.

9. MCorp Financial, Inc.

10. MCorp Management, Inc.

The undersigned counsel of record is not aware of any subsidiaries of any of the foregoing corporate parties that are not wholly-owned unless specifically noted.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF ALL PARTIES ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

CITATIONS OF OPINIONS AND JUDGMENTS . . . 1

JURISDICTION 1

STATEMENT OF THE CASE 1

ARGUMENT 11

I. The Court of Appeals Properly Conducted A *De Novo* Review of An Unambiguous Contract 11

A. MCorp Did Not *Approve* Bridge Bank's Participation in the MEBA Plan 15

B. Bridge Bank Did Not *Adopt* the MEBA Plan and Trust 16

C. Bridge Bank Was Not an *Affiliate* of MCorp 17

D. The Court of Appeals Correctly Interpreted the Relevant Documents . . . 19

E. Estoppel Does Not Apply 21

II. The Court of Appeals Correctly Ordered Dismissal of the Case Below Even Though Fiduciary Instructions Were Sought as Alternative Relief Because Persons Whose Interests Would be Directly Affected By Such Instructions Had Not Been Joined As Parties 25

III. The Stay Ordered by the Court of Appeals Pending Appeal Was Proper and Can Not Itself Constitute Reversible Error 26

IV. The Court of Appeals Acted Within the Parameters of Its Judicial Power Obviating the Need for an Exercise of This Court's Powers of Supervision 28

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Alday v. Container Corp. of America,
906 F.2d 660 (11th Cir. 1990),
cert. denied, 498 U.S. 1026 (1991) 22

Black v. TIC Inv. Corp., 900 F.2d 112
(7th Cir. 1990) 23

*Carpenters Amended and Restated Health
Benefit Fund v. Holleman Constr. Co., Inc.*,
751 F.2d 763 (5th Cir. 1985) 18

Coleman v. Nationwide Life Ins. Co.,
969 F.2d 54 (4th Cir. 1992), *cert. denied*,
113 S. Ct. 1051 (1993) 22

Cromwell v. Equicor-Equitable HCA Corp.,
944 F.2d 1272 (6th Cir. 1991),
cert. dism'd, 113 S. Ct. 2 (1992) 22

Degan v. Ford Motor Co., 869 F.2d 889
(5th Cir. 1989) 22

Greany v. Western Farm Bureau Life Ins. Co.,
973 F.2d 812 (9th Cir. 1992) 21, 23

Hansen v. Peoples Bank of Bloomington,
594 F.2d 1149 (7th Cir. 1979) 26

*Henglein v. Informal Plan for Plant
Shutdown for Salaried Employees*,
974 F.2d 391 (3rd Cir. 1992) 22

Hebert v. Exxon Corp., 953 F.2d 936 (5th Cir. 1992) 27

Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155 (3d Cir. 1990) 23

Lyng v. Payne, 476 U.S. 926 (1986) 24

MCorp v. Bd. of Governors of Federal Reserve System of U.S., 900 F.2d 852 (5th Cir. 1990), *rev'd in part*, 112 S. Ct. 459 (1991) 2

MCorp v. Clark, 755 F. Supp. 1402 (N.D. Tex. 1991) 2

Miller v. Coastal Corp., 978 F.2d 622 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1586 (1993) 22

Moore v. Metropolitan Life Ins. Co., 856 F.2d 488 (2nd Cir. 1988) 22

Pierre v. Conn. General Life Ins. Co., 932 F.2d 1552 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 453 (1991) 11

Pulitzer-Polster v. Pulitzer, 784 F.2d 1305 (5th Cir. 1986) 26

Russo v. Health, Welfare & Pension Fund Local 705, Int'l Bd. of Teamsters, 984 F.2d 762 (7th Cir. 1993) 23

Sandstrom v. Chemlawn Corp.,
904 F.2d 83 (1st Cir. 1990) 25

Taylor v. BANK ONE, N.A., 137 Bankr. 624
(S.D. Tex. 1992) 1

Taylor v. McElroy, 360 U.S. 709 (1959) 26

Texas American Bancshares v. Clarke,
954 F.2d 329 (5th Cir. 1992) 2

United States v. LeMaire, 826 F.2d 387
(5th Cir. 1987), *cert. denied*,
485 U.S. 960 (1988) 27

Williams v. Bridgestone/Firestone, Inc.,
954 F.2d 1070 (5th Cir. 1992) 22

STATUTES

12 U.S.C. § 91 . . . . . 26, 27

12 U.S.C. § 1821(i)(1)(B) 19

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1651 28

29 U.S.C. § 1001 2

29 U.S.C. § 1002(40) 18

29 U.S.C. § 1102(a)(1) 22

29 U.S.C. § 1144(b)(6)(A)(ii) 18

RULES

Fed R. App. P. 8 28

Fed R. Civ. P. 19(a)(2) 26

CITATIONS OF OPINIONS AND JUDGMENTS

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was not published. The district court's findings of fact, conclusions of law and final judgment are reported at *Taylor v. BANK ONE, N.A.*, 137 Bankr. 624 (S.D. Tex. 1992).

JURISDICTION

This Court's jurisdiction was invoked under 28 U.S.C. § 1254(1). The Court of Appeals entered its opinion and judgment on April 22, 1993 and it denied a Petition for Rehearing and Suggestion for Rehearing En Banc on July 15, 1993. The Petition for Writ of Certiorari was filed on September 1, 1993.

STATEMENT OF THE CASE

This action is an attempt by Petitioners to shift to Respondent BANK ONE, Texas, N.A. ("BANK ONE"), the purchaser of certain assets from the receiver of a group of failed Texas banks, Petitioners' own continuing responsibility to provide welfare benefits to the retired and disabled former employees of those failed Texas banks.

On March 28, 1989, the Office of the Comptroller of Currency ("Comptroller") declared insolvent twenty banks (the "Failed Banks") owned directly or indirectly by MCorp, Inc. ("MCorp")[1]. (FF 6) On that same day, the Federal Deposit Insurance Corporation ("FDIC") was appointed

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[1]An involuntary petition for bankruptcy was filed against MCorp on March 21, 1989. (FF 1) ("FF" refers to the district court's Finding of Facts contained in the Appendix to the Petition for Writ Certiorari ("Pet")).

Receiver for each of the Failed Banks ("FDIC-Receiver")[2] and sold some of the assets of the Failed Banks to The Deposit Insurance Bridge Bank, National Association ("Bridge Bank")[3], a newly-formed bridge bank owned by the FDIC, in exchange for the assumption of certain specified liabilities. Bridge Bank immediately employed all active employees of the Failed Banks. (FF 7) This suit concerns benefits payable to former employees of the Failed Banks who retired or became disabled prior to the receiverships and were never employed by Bridge Bank.

MCorp had established the Welfare Plan of the Mercantile Employees' Beneficiary Association (the "MEBA Plan") to provide benefits for its active, retired, and disabled employees, and those of its affiliates, pursuant to the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001 et seq. ("ERISA"). It had also established the Mercantile Employees' Beneficiary Association Trust (the "MEBA Trust") as the funding medium for the MEBA Plan. (FF 2, 3) Participants in the MEBA Plan included active, retired and disabled employees of either the Failed Banks or other affiliates of MCorp, including six banks which did not fail (the "Solvent

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[2]The banking crisis affecting the MCorp system has been reported in *MCorp v. Bd. of Governors of Federal Reserve System of U.S.*, 900 F.2d 852 (5th Cir. 1990), *rev'd in part*, 112 S. Ct. 459 (1991) and *Texas American Bancshares v. Clarke*, 954 F.2d 329 (5th Cir. 1992) (implicitly overruling the case cited by Petitioners as background, *MCorp v. Clarke*, 755 F. Supp. 1402 (N.D. Tex. 1991).

[3]Bridge Bank changed its name to BANK ONE, Texas, N.A. after July 5, 1989, when Banc One Corporation entered into an Interim Management Agreement with FDIC for management of Bridge Bank pending its contemplated sale. (FF 5)

Employers"). (FF 19, 21) Employees of MBank Dallas, N.A., one of the Failed Banks, had administered the entire MEBA Plan. Neither the MEBA Plan nor the Solvent Employers had employee benefits personnel. Accordingly, after March 28, 1989, employees of Bridge Bank continued to administer the MEBA Plan for a fee under a contract between Bridge Bank and MCorp. (App E)[4]

Because Bridge Bank's first day of business was March 29, 1989, no new benefit plan or trust documents had been prepared before that day. On that day, however, the Bridge Bank employed Stephanie Burks, the former benefits manager for MBank Dallas, N.A., as its own benefits manager. Until the previous day, Ms. Burks had administered the MEBA Plan for the entire MCorp system. (FF 22)

Ms. Burks realized at once that the new employees of Bridge Bank were no longer covered by a benefits plan and that it was her responsibility to ensure that "7,000 people were covered by some plan". (FF 22, 24) On her first day at Bridge Bank, she established a new benefits plan for all active Bridge Bank employees ("Bridge Bank Plan") because she understood that they were no longer covered by the MEBA Plan she had formerly administered. While she wanted the Bridge Bank Plan to "mirror" the MEBA Plan, she understood and intended that the Bridge Bank Plan would provide benefits solely to the employees of Bridge Bank, with former employees of the Failed Banks continuing to receive their benefits from the MEBA Plan. (FF 24)

On March 29, 1989, Bridge Bank contracted for new life, business travel accident, and accidental death and dismemberment insurance policies and entered into a new

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[4]"App" refers to the Appendix following this brief.

benefit administration contract for its health benefits with Prudential Insurance Company of America ("Prudential"). (TR187)[5] The written contract later signed with Prudential specifically defined the participants in the Bridge Bank Plan as all active and retired employees of Bridge Bank, thereby excluding former employees of the Failed Banks that had not become Bridge Bank employees. (Pet 168a, 176a) Ms. Burks, on behalf of Bridge Bank, also employed new counsel to draft a new set of benefits plan and trust documents and entered into a separate trust agreement with a new trustee. (TR275-276, FF 27) Thus, upon commencing operations, Bridge Bank created new benefit plan documents, had a new sponsor for its benefit plan, had a new pool of participants, wrote out a new trust agreement, hired new attorneys, had new directors, formed a new plan committee, had new contracts and resolutions, acquired new policies, and established new trust accounts. (FF 27) Bridge Bank's Board of Directors formally adopted new benefit plan documents on May 5, 1989, effective as of March 29, 1989. (FF 8, Pet 122a, 151a)

Bridge Bank's actions in establishing the new benefits plan for its new employees created no "serious dilemma" for the MEBA Plan Administrator. The only question raised was which plan (or plans) was entitled to the approximately $6,200,000 in assets held by the MEBA Trust and in what proportions. (TR284) Most of the funds in the MEBA Trust, of course, had been contributed by or on behalf of individuals who had since become employees of Bridge Bank. (TR395-397) Both Petitioners and Respondents agree this question of entitlement is answered by the terms of Article XI of the MEBA Trust agreement.

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[5]"TR" refers to the trial transcript.

Petitioners, however, have incorrectly described the options available in Article XI of the MEBA Trust agreement upon dissolution or liquidation of any "participating employer". (Pet 6) As explained by the court of appeals, Article XI provides *three* options — not the two cited by Petitioners. (Pet 6, 15a-16a) These three options are (1) partial dissolution of the MEBA Trust with its proceeds distributed pro rata to or for the benefit of the participants who were withdrawn (§ 11.01, Pet 85a), (2) continuation of the MEBA Trust if the successor corporation adopts the trust agreement or otherwise assumes the duties and responsibilities of the MEBA Plan and Trust in accordance with the provisions of § 10.02 of the Trust (§ 11.02, Pet 86a), or (3) transfer of trust assets if a successor corporation establishes a separate plan and trust for the benefit of its own employees (§ 11.02, Pet 86a). Petitioners omit reference to the third option—just as they did in the court of appeals.

Bridge Bank elected the third option. It established a "separate plan and trust for the continuation of benefits for its employees" and sought a transfer of the portion of the excess assets[6] in the MEBA Trust that had been contributed on behalf of its employees — the former active employees of the Failed Banks. (Pet 115a, 151a) The MEBA Plan Administrator, however, refused to transfer the funds and further refused to pay benefits for the period after March 29, 1989 to any former Failed Bank employees subsequently employed by Bridge Bank. (App D)

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[6]The excess assets were those not required to pay claims either submitted or anticipated for the period prior to March 29, 1989, and were estimated by BANK ONE to be approximately $1.5 million. (Ex 75)

Petitioners now contend that Bridge Bank actually elected the second option—that is, to continue the MEBA Plan and Trust. (Pet 6) Notably, this position is directly contrary to that taken by Petitioners in 1989 when there were excess assets in the MEBA Trust which they wished to avoid transferring to the Bridge Bank Trust. As the court of appeals found, however, the terms of the MEBA Plan and Trust prohibited Bridge Bank from electing the second option for a number of reasons, most especially because MCorp refused to allow Bridge Bank to participate in its Plan. (Pet 13a, 17a-19a) To elect the second option, Bridge Bank would have had to comply with the provisions of § 10.02 of the MEBA Trust that required eligibility on the part of the successor corporation and adoption by written instrument, duly executed, acknowledged and delivered. Bridge Bank was not eligible to adopt the MEBA Plan because it was not an affiliate of MCorp and had never obtained the approval of the Compensation Committee of MCorp's Board of Directors as required by § 10.2 of the MEBA Plan. (Pet 105a) In addition, Bridge Bank never adopted the MEBA Plan, by written instrument or otherwise.

In 1989, MCorp consistently took the position that the Bridge Bank had not and could not become a participating employer. (App A-C). MCorp informed the bankruptcy court in its Disclosure Statement that the Failed Banks ceased participation in the MEBA Trust on March 29, 1989. (Ex 103[7], TR153-54) Jimmy F. Taylor ("Taylor"), the MEBA Plan Administrator, ordered the trustee of the MEBA Trust not to accept any contributions from the Bridge Bank or its employees, and not to pay any claims by active or former employees of Bridge Bank incurred after March 31, 1989. (App D). In order to block Bridge Bank's efforts to obtain a portion of the excess assets in the MEBA

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[7]"Ex" refers to a trial exhibit.

Trust, the MCorp Compensation Committee held an emergency early-morning meeting to amend the MEBA Trust on May 5, 1989 (the day Bridge Bank's board of directors was scheduled to consider adoption of the Bridge Bank Plan) to clarify that the Bridge Bank could not become a "successor employer" in the MEBA Plan and Trust.[8] (App A)

An even more basic flaw in Petitioners' argument, however, is its failure to acknowledge that Bridge Bank never adopted or assumed responsibility for the MEBA Trust in a document meeting the requirements of § 10.02 of the MEBA Trust agreement. On May 5, 1989, Bridge Bank's board of directors passed certain resolutions adopting the MCorp Pension and Moneymax Plans. Instead of adopting the MEBA Plan, however, the board resolved that it was in the best interest of Bridge Bank employees to establish a successor plan and trust for their benefit. (Pet 119a)

All of Bridge Bank's actions were designed to establish a successor plan and trust for the benefit of *its employees* as contemplated under the third option. At the May 5, 1989 meeting, Bridge Bank's board of directors adopted a welfare benefit plan for Bridge Bank's own employees effective March 29, 1989. (Pet 122a) In the May 10, 1989 letter referred to by Petitioners, Bridge Bank's president notified MCorp that it had "elected to establish a separate trust agreement for the continuation of benefit for *its employees*" (emphasis added) — the third option under Article XI of the MEBA Trust agreement. (Pet 115a) That letter, contrary to the representation made by

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[8]Although the district court held that the amendment was ineffective, the attempt itself is conclusive evidence that MCorp never permitted or intended Bridge Bank to become a participating employer.

Petitioners (Pet 6-7), did not demand payment of "all remaining MEBA Welfare Plan funds". Instead, it requested that the trust assets held "on behalf of the *active employees* of Bridge Bank be transferred to MTrust Corp., N.A., as Trustee of the Bridge Bank Employees' Beneficiary Association Trust Agreement". (emphasis added) Bridge Bank's president further clarified his request in the same letter by stating it was made in accordance with § 11.02 of the MEBA Trust and sought only "the pro rata portion of the assets held in the [MEBA Trust] which relate to the active employees of Bridge Bank." (App 115a-116a)

Taylor's true "dilemma" as Administrator of the MEBA Plan, simply put, was how to shift financial responsibility for future benefits for the retired and disabled former employees of the Failed Banks from MCorp to Bridge Bank. Taylor, of course, could have paid the Bridge Bank Trust that portion of the MEBA Trust funds attributable to Bridge Bank's employees and thereafter continued administering the MEBA Plan in accordance with its terms, including paying benefits to employees of the Solvent Employers and the retired and disabled former employees of the Failed Banks. Instead, he sought to protect MCorp and the Solvent Employers—at the expense of the retired and disabled former employees of the Failed Banks—by purporting to allocate the commingled MEBA Trust funds between the Solvent Employers and the Failed Banks, a procedure not authorized in the MEBA Trust. He then used only the funds he allocated to the Failed Banks to satisfy claims from the retired and disabled former employees of the Failed Banks. When those funds ran out, he stopped paying benefits to those retirees and disabled persons, but continued benefits to employees (and similarly situated former employees) of the Solvent Employers.

In fact, Taylor instructed the trustee for the MEBA Trust not to pay claims of Bridge Bank employees incurred after March 31, 1989, and not to accept contributions from Bridge Bank for coverage of its employees after March 31, 1989. (App D) When the trust funds he allocated to the Failed Banks began running low, however, he totally reversed his field by commencing this suit, seeking a declaration that Bridge Bank assumed responsibility for the benefits payable to retired and disabled former employees of the Failed Banks *by becoming a participating employer in the MEBA Plan until June 9, 1989.* Inexplicably, Taylor never filed a claim against the bankruptcy estate of MCorp (the MEBA Plan sponsor), or in any of the receiverships of the Failed Banks, although these options were called to his attention by Respondents.

Taylor's newly-found concern about co-fiduciary liability arising from Bridge Bank's request for transfer of a portion of the MEBA Trust assets is baseless. (Pet 7) To begin, Taylor made no allegations in his pleadings about such concerns. Furthermore, the litigation agreement ("Litigation Agreement") between FDIC and BANK ONE executed on April 12, 1990 (one year later), which Petitioners so stridently criticize, merely clarified the proper financial responsibilities between the parties. (Ex 84) Because Bridge Bank had been unsuccessful in obtaining a transfer of the excess assets in the MEBA Trust attributable to its employees, the FDIC provided the initial monies to fund the Bridge Bank Plan. The FDIC also agreed to indemnify Bridge Bank for any liabilities of the Failed Banks not assumed by Bridge Bank when it purchased their assets. (Ex 16, 18) The Litigation Agreement clarified that FDIC, as the source of initial funding, would get the benefit of any recovery of such excess funds by Bridge Bank from the MEBA Trust with "the method, manner, and amount . . . [to] be agreed to by the parties at a later date." (Ex 84)

Nothing in the Litigation Agreement deprived the beneficiaries and participants of the Bridge Bank Plan and Trust of their benefits. It simply recognized the FDIC's right to be repaid the monies advanced to benefit Bridge Bank's employees — a right that became academic since the MEBA Trust otherwise spent the funds Taylor allocated to the Failed Banks and Bridge Bank did not thereafter pursue its claim to any such funds.

In addition, Taylor clearly did *not* rely on Bridge Bank's representation that it had become a participating employer in the MEBA Plan, as he now claims. (Pet 8) If he had relied on such a representation, he would never have devised the scheme for allocation of the MEBA Trust funds between the Solvent Employers and the Failed Banks. Specifically, if Taylor had truly believed that Bridge Bank had become a participating employer by adopting the MEBA Trust under § 11.02, he would have continued paying benefits to Bridge Bank employees until Bridge Bank's withdrawal, and then distributed the excess funds as provided in § 11.02. If, however, Bridge Bank had effectively exercised the third option under Article XI by establishing a separate plan and trust for its employees (which is what Bridge Bank announced in its May 10, 1989 letter) (Pet 114a), Taylor would have distributed the trust funds attributable to Bridge Bank employees to the new trust. Taylor, of course, did neither.

The court of appeals correctly determined, as a matter of law, that Bridge Bank had not become a participating employer in the MEBA Plan and consequently was not liable to provide benefits to former employees of the Failed Banks who were never employed by Bridge Bank.

ARGUMENT

The court of appeals correctly conducted a *de novo* review of the district court's conclusions of law. As the court of appeals recognized, the essence of this case is contract interpretation. Appellate courts review the interpretation of unambiguous written contracts on a *de novo* basis. *Pierre v. Conn. General Life Ins. Co.*, 932 F.2d 1552, 1561 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 453 (1991). The court of appeals did not make unwarranted fact findings or deny benefits to retired and disabled employees of the Failed Banks. Instead that court held, as a matter of law, that Bridge Bank could not have become a participating employer under the MEBA Plan and Trust and thus did not inadvertently assume liability for benefits payable to former employees of the Failed Banks who did not become active employees of Bridge Bank. The court of appeals' opinion in no way affected the entitlement of those former employees to benefits under the MEBA Plan and Trust.

I. The Court of Appeals Properly Conducted A *De Novo* Review of An Unambiguous Contract.

Contrary to Petitioners' assertion, the court of appeals made no "sweeping" fact finding. That court found that the district court had erred as a matter of law in concluding that Bridge Bank unintentionally elected to "adopt the MEBA Plan and Trust Agreement." (Pet 17a) The court of appeals conducted its review from the four corners of the relevant documents. For instance, contrary to Petitioners' claim (Pet 14), the finding that "Bridge Bank, through its benefit administrator, intended to set up a plan new and distinct from the MEBA Plan" *was first made by the district court*, not the court of appeals. In FF 13, the district court found that "Bridge Bank attempted to set up its own Plan, and related Trust agreement". (Pet 39a) In FF 24, the district

court found that Ms. Burks, Bridge Bank's benefits administrator, intended to set up a new benefits plan pertaining solely to the employees of Bridge Bank, and distinct from the MEBA Plan. (Pet 43a) Finally, in FF 27, the district court again found that Ms. Burks believed that a separate plan had been established because Bridge Bank: "created new plan documents; had a new sponsor; had a new pool of participants; wrote out a new trust agreement; had new attorneys; had new directors; had a new plan committee; had new contracts and resolutions; had new policies; and, had new trust accounts." (Pet 44a).

Petitioners are also mistaken in concluding that "[t]here is *no evidence* to support the court of appeals' appellate fact finding that Bridge Bank carried out its intent to set up a new employee welfare plan for its 7,000 employees". (Pet 14; emphasis in original) The district court specifically found that the Bridge Bank Plan had new insurance policies, new documents, and new contracts and resolutions. (FF 27) Ms. Burks also provided uncontradicted testimony that, on her first day as a Bridge Bank employee, she contacted Prudential to arrange new insurance policies and a new contract for benefits administration. (TR187) The later execution date of the written agreement between Prudential and Bridge Bank hardly contradicts the *district court's* fact finding, given Ms. Burks' testimony and that the written contract was explicitly made effective April 1, 1989.

Petitioners are misleading in their discussion of the administration agreement between Bridge Bank and the MEBA Plan. (Pet 15) As of March 29, 1989, MCorp and the MEBA Plan needed the former Failed Bank employees to administer that Plan. Bridge Bank therefore agreed to administer the MEBA Plan *for a fee* in accordance with a *written* Administrative Services Agreement with MCorp. (App E) The administration of the MEBA Plan by Bridge

Bank – under such circumstances hardly destroys the distinction between the MEBA Plan and the Bridge Bank Plan. Instead, the district court's findings that the two parties entered into an Administrative Services Agreement (FF 56) and that Bridge Bank obtained its own services contract with Prudential supports the court of appeals' statement that "Bridge Bank carried out its intent to set up a new employee welfare plan for its 7,000 employees through the purchase and maintenance of new group insurance policy and through distinct administration of benefits commencing March 29, 1989." (Pet 23a)

Petitioners' assertion that BANK ONE continued to use the MEBA Plan summary plan description for the BANK ONE Plan is simply wrong. (Pet 15) Neither the findings of fact they reference nor the evidence presented at trial support such a claim. While Bridge Bank did not prepare a new summary description, neither did it continue using the old MCorp documents. Instead, Bridge Bank shipped all remaining summary plan descriptions to MBank El Paso, one of the Solvent Employers that could still make use of them. (TR249)

The district court's FF 24 and 65 do not support Petitioners' statement that BANK ONE must have included the "Subject Participants". (Pet 16) Both FF 24 and 26, as well as other evidence previously discussed, unequivocally show that the Bridge Bank Plan was established for its employees. Bridge Bank did not purchase the stock of the Failed Banks. It purchased certain assets from the receiverships of the Failed Banks and used those assets to establish a new business under a new name. As part of the compensation provided to its employees for their current services, Bridge Bank established its own employee benefit plan. For that reason, the terms of the Bridge Bank Plan and Trust specifically apply to Bridge Bank employees and

do not include former employees of the previous owners of some of Bridge Bank's assets—just as the terms of the MEBA Plan only applied to employees of its "participating employers".

Ms. Burks testified extensively about establishing the Bridge Bank Plan. Her testimony and the district court's FF 24 clearly indicated that the new plan was for the benefit of the 7,000 new Bridge Bank employees. (Contrast Pet 15)[9] The terms of the MEBA Plan and Trust precluded Bridge Bank from becoming a participating employer—so Bridge Bank could hardly have operated under the MEBA Plan at all, much less until June 9, 1989.

As noted by the court of appeals, to become a "participating employer" in the MEBA Plan, Bridge Bank had to meet the requirements which at trial became known as the "three A's" — (1) Affiliation, (2) Adoption, and (3) Approval. Section 10.2 of the MEBA Plan limits the companies which may participate in the Plan to those that are or become *affiliated* with MCorp and which with "the consent and *approval* of the Compensation Committee of the Board of Directors of the Company . . . *adopt* this Plan or any Benefit Plan hereunder for its Employees." (Pet 19a, 105a)

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[9]The stipulation referred to by Petitioners as to the meaning of "participants" applies to the MEBA Welfare Plan -- not the Bridge Bank Plan. (Pet. 15-16) Bridge Bank was not required to notify former employees of the Failed Banks of their exclusion from the Bridge Bank Plan since by the terms of the Bridge Bank Plan, former employees of the Failed Banks were never included unless they became employees of Bridge Bank.

A. MCorp Did Not *Approve* Bridge Bank's Participation in the MEBA Plan

Petitioners completely ignore the requirement of approval by the Compensation Committee of MCorp's Board of Directors before Bridge Bank could become a participating employer. Petitioners also ignore all of the evidence presented at trial conclusively establishing that MCorp did not want Bridge Bank as a participating employer and that MCorp *never approved* such participation. (App A-B) The district court made no finding that such approval had ever been given.

Specific evidence that proves the approval requirement was never met includes:

(1) The Compensation Committee of the MCorp Board of Directors passed a resolution on May 5, 1993 attempting to amend the MEBA Trust to clarify and reaffirm the Plan sponsor's original intent that no business entity could adopt the MEBA Plan or Trust or become a successor or participating employer unless it received prior approval of the MCorp Board of Directors. The resolution also "confirmed that Bridge Bank is not a 'successor' or 'successor employer' as such terms are used in the Plan documents and related Trust instruments." (App A)

(2) MCorp wrote Bridge Bank informing it that it was never a participating employer in the MEBA Plan and that former Failed Bank employees who became Bridge Bank employees ceased to be entitled to benefits from the MEBA Plan and Trust on March 28, 1989. (App C)

(3) MCorp notified the bankruptcy court in its disclosure statement that the Failed Banks automatically ceased participation in the MEBA Plan and that active employees of the Failed Banks ceased their participation in the MEBA Plan after March 28, 1989. (Ex 103)

(4) Taylor, as Plan Administrator for the MEBA Plan, instructed the Trustee for the MEBA Trust not to accept any contributions from Bridge Bank relating to any period of coverage after March 31, 1989 and not to pay any claims by active or former employees of Bridge Bank incurred after March 31, 1989. (App D)

Thus, even if Bridge Bank had wanted to become a participating employer in the MEBA Plan, MCorp prevented such a result simply by refusing to approve Bridge Bank's participation.

B. Bridge Bank Did Not *Adopt* the MEBA Plan and Trust

Likewise, the district court made no finding that Bridge Bank adopted the MEBA Plan and Trust in the manner specified by the documents. Section 10.02 of the MEBA Trust required adoption or assumption of the responsibilities of the Trust to be evidenced by written instrument, duly executed by a company's president or chief personnel officer. (Pet 85a) No such document is found in the record of this case. The resolution of Bridge Bank's board of directors that addressed pension and welfare benefit plans specifically adopted the MCorp Pension Plan; however, in stark contrast, there is no language in the resolution adopting the MEBA Plan. (Pet 120a)

How Petitioners can ignore the need for such a written instrument to evidence adoption of the Trust is puzzling. Again, § 11.02 of the MEBA Trust provides that any corporation succeeding to the interest of an employer by sale "may elect to continue this Trust by *adopting* this Trust Agreement or by otherwise assuming the duties and responsibilities of the Plan and Trust *in accordance with the provisions of Section 10.02 hereof*". (emphasis added) (Pet 86a) Section 10.02 clearly requires (in addition to the eligibility requirements of affiliation and approval) a written instrument, duly executed and delivered, to evidence such adoption or assumption. (Pet 85a)

The findings of fact of the district court also support the court of appeals' conclusion that Bridge Bank did not adopt the MEBA Plan. The district court specifically found that (1) Peter Bartholow, President and CEO of MCorp, believed Bridge Bank merely established a successor trust (FF 12), (2) Bridge Bank attempted to set up its own employee benefits plan (FF 13), (3) Bridge Bank established its own employee benefit plan and trust for its employees (FF 15), (4) Ms. Burks, Benefits Administrator for MCorp on March 28, 1989 and for Bridge Bank on March 29, 1989, intended to set up a new benefits plan for Bridge Bank employees, and (5) Ms. Burks took a number of actions to set up a new benefits plan consistent with her intent (FF 24-27).

C. Bridge Bank Was Not an *Affiliate* of MCorp

It is undisputed that Bridge Bank was not an affiliate of MCorp. Petitioners, however, argue that affiliation is not required under Article 11 of the Trust. On the contrary, affiliation is a crucial eligibility requirement, designed to preserve the status of an ERISA trust—a concept that

Petitioners now conveniently ignore.[10] The court of appeals, charged with interpreting unambiguous documents, found that affiliation was a requirement under § 10.2 of the MEBA Plan and § 11.02 of the MEBA Trust for a successor corporation to adopt MEBA Plan.[11] (Pet 18a-19a) The court of appeals also noted that, regardless of whether affiliation was required, there is no doubt that approval by MCorp was a prerequisite for adoption of the MEBA Trust. (Pet 19a) As noted previously, that approval was undeniably lacking.

The precedent cited by Petitioners does not support their claim that the district court's legal findings are protected by the clearly erroneous rule. The court in *Carpenters Amended and Restated Health Benefit Fund v. Holleman Constr. Co. Inc.*, 751 F.2d 763 (5th Cir. 1985) addressed a question relating to the interpretation of an ambiguous contract. Unfortunately for Petitioners, however, that opinion acknowledged that when a contract can be interpreted from its four corners, a reviewing court is as competent as the trial court to do so. 751 F.2d at 766. In accordance with that latter principle, the court of appeals correctly determined that to adopt the MEBA Plan and Trust, Bridge Bank would have had to (1) be an *affiliate* of

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[10]Affiliation is necessary to preserve the status of plans maintained by a single controlled group of corporations. If Bridge Bank had become a participating employer, the MEBA Plan would have become a multiple employer welfare arrangement under § 3(40) of ERISA, 29 U.S.C. § 1002(40), thereby losing the preemptive effect of ERISA and rendering it subject to state insurance laws. 29 U.S.C. § 1144(b)(6)(A)(ii)

[11]Petitioners claim of ambiguity in the language comes too late. As the court of appeals observed, no such claim was made in the district court or the appellate court. (Pet 15a)

MCorp, (2) expressly *adopt* the terms on the Trust and (3) obtain *approval* from MCorp. None of these conditions were met.

D. The Court of Appeals Correctly Interpreted the Relevant Documents

Petitioners incorrectly conclude that the court of appeals' opinion would allow a successor corporation to obtain trust assets without corresponding liabilities. (Pet 20) Bridge Bank assumed liability for benefits for 7,000 former employees of the Failed Banks (including the substantial present value of the expected costs of their retirement and disability benefits) without the MEBA Trust ever contributing any portion of its assets to defray such liabilities. (Pet 125a) Thus, Bridge Bank actually relieved the MEBA Trust of significant future obligations.

The Purchase and Assumption Agreement ("P&A") between the FDIC-Receiver and Bridge Bank also confirms that Bridge Bank did not assume liability for benefits payable to the retired and disabled former employees of the Failed Banks. (Ex 16) The P&A effected a transaction in which certain assets and liabilities were transferred by FDIC-Receiver to Bridge Bank pursuant to 12 U.S.C. § 1821(i)(1)(B) (West Supp. 1989). The liabilities assumed by Bridge Bank are specifically listed in § 2.1 of the P&A. As the court of appeals noted, the wording of this provision unambiguously conveys the exclusive nature of the liabilities assumed. Section 2.1 provides that the "Assuming Bank expressly assumes at book value and agrees to pay, perform and discharge all of the following liabilities of the Failed Bank . . . and none other." The MEBA Plan is not listed. (Pet 24a-25a)

Section 4.7 of the P&A (providing for the transfer of the trust business of the Failed Banks) simply is not applicable. It states that "[t]he trust business of the Failed Bank, *if any*, is hereby transferred to the Assuming Bank . . ." (emphasis added) Even if read broadly, § 4.7 relates only to the Failed Bank's responsibilities *qua* fiduciary or *qua* representative.[12] The liability sought to be imposed by Petitioners for funding the MEBA Plan, in contrast, was a contractual obligation undertaken by the Failed Banks. The MEBA Trust—not the Failed Banks—held the MEBA Plan assets in a fiduciary or representative capacity. The district court's conclusion that the P&A provided an additional and distinct basis for liability to the Failed Banks' retired and disabled employees was, therefore, an erroneous conclusion of law. (Pet 25a-26a)

Likewise, Petitioners' reference to the proof of claim filed (and later withdrawn) by BANK ONE in the MCorp bankruptcy proceeding ("Proof of Claim") lends no support to their position. The Proof of Claim did reference the

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[12]Section 4.7(a) provides further, in pertinent part, that

> "The Assuming Bank shall, without further transfer, substitution, act or deed, to the full extent permitted by law, succeed to the rights, obligations, properties, assets, investments, deposits, agreements and trusts of the Failed Bank under (i) trusts, executorships, administrations, guardianships, agencies and (ii) other fiduciary or representative capacities, all to the same extent as though the Assuming Bank had originally assumed the same; provided, that any liability based on the malfeasance or nonfeasance of the Failed Bank, its directors, officers, employees or agents with respect to the trust business of the Bank is not assumed hereunder."

funds held in the MEBA Trusts. Nothing in the Proof of Claim, however, indicated that those funds constituted "the trust business of the Failed Bank" or that they were held by a Failed Bank in a fiduciary capacity. The Proof of Claim carefully noted that funds were contributed to and held by the MEBA Trust, a third party. The Proof of Claim also recited that "participation by the Failed Banks in [the MEBA Plan] was terminated by MCorp as of March 28, 1989" and that BANK ONE established a successor plan and trust for the benefit of "Failed MBank Welfare Benefit Participants *employed* by [BANK ONE]". (emphasis added) (Ex 75)

E. Estoppel Does Not Apply

The court of appeals correctly determined that its holding that Bridge Bank did not adopt the MEBA Plan and Trust Agreement vitiates Petitioners' estoppel argument. Since Bridge Bank did not adopt the MEBA Plan, it could not have acquired any extra-contractual liability by estoppel. *See Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 816 (9th Cir. 1992) (whether a claim is preempted by ERISA is reviewed *de novo* by the appellate court).

Indeed, the only way for the district court to have concluded that Bridge Bank was estopped from claiming that coverage under its welfare plan was limited to its own employees would be if it had made a finding that the terms of the Bridge Bank Plan were informally modified to include the retired and disabled former employees of the Failed Banks. The district court made no such fact finding. Instead, it found that Bridge Bank attempted to establish a benefits plan for its own employees. Bridge Bank did tell its employees that their benefits would not be changed as a result of the closing of the Failed Banks, but there is no evidence it ever represented that it would provide benefits to retired and disabled former employees of the Failed Banks

who did not become active employees of Bridge Bank. (Tr. 113, 158, 244).

A claim of oral modification is contrary to the central policy goals of ERISA. Therefore, ERISA-qualified employee benefits plans cannot be estopped. *Williams v. Bridgestone/Firestone, Inc.*, 954 F.2d 1070 (5th Cir. 1992) ("'ERISA precludes oral modifications to benefit plans . . . and claims of promissory estoppel are not cognizable in suits seeking to enforce rights to pension benefits.'") (quoting *Degan v. Ford Motor Co.*, 869 F.2d 889, 895 (5th Cir. 1989)); *Henglein v. Informal Plan for Plant Shutdown for Salaried Employees*, 974 F.2d 391, 401 (3rd Cir. 1992) (a written ERISA plan, no matter how informal, cannot be orally modified); *Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54, 59 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 1051 (1993) (estoppel is not available to vary the written terms of an ERISA plan); *Miller v. Coastal Corp.*, 978 F.2d 622, 625 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 1586 (1993) (an ERISA plan cannot be modified by informal communications, whether oral or written); *Cromweli v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1276 (6th Cir. 1991), *cert. dism'd*, 113 S.Ct. 2 (1992) (claim of promissory estoppel is preempted by ERISA); *Alday v. Container Corp. of America*, 906 F.2d 660, 666 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) (estoppel cannot be used to amend or modify an ERISA plan); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2nd Cir. 1988) (absent actual fraud, an ERISA plan is not subject to amendment as a result of informal communications between employer and beneficiaries). The ERISA statute itself specifically and clearly rejects the notion of oral modification as to employee benefits plans. 29 U.S.C. § 1102(a)(1) (1985). Accordingly, the court of appeals correctly determined, as a matter of law, that the doctrine of estoppel

could not create extracontractual liability in the formation of an employee benefits plan.

The Ninth Circuit has recently clarified its position on the applicability of equitable estoppel in ERISA cases in *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812, 821 (9th Cir. 1992), holding that "a party cannot maintain a federal equitable estoppel claim against *a trust fund* where recovery on the claim would contradict written plan provisions." Thus, the Ninth Circuit case cited by Petitioners provides no support for their argument. In addition, the Seventh Circuit has limited the holding of *Black v. TIC Inv. Corp.*, 900 F.2d 112 (7th Cir. 1990) to the facts of that case. *Russo v. Health, Welfare & Pension Fund Local 705, Int'l Bd. of Teamsters*, 984 F.2d 762, 767 (7th Cir. 1993). In *Russo*, the Seventh Circuit reiterated its position that "ERISA does not recognize oral modification of a written benefit plan which precludes the use of estoppel principles to alter ERISA plans." *See also*, *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990).

Even if estoppel were permitted to modify the terms of ERISA documents, Petitioners' claim would fail because (1) Bridge Bank made no misrepresentations and (2) Petitioners did not rely to their detriment upon anything Bridge Bank said or did. Bridge Bank consistently claimed to have established a successor trust *for the benefit of its employees*. Bridge Bank never claimed that it would provide benefits for the retired and disabled former employees of the Failed Banks, and Petitioners do not contend that any such representation was made by Bridge Bank. The district court found that Bridge Bank claimed to be a "successor to the Failed Banks", and to have established "the Bridge Bank Welfare Plan and the Bridge Bank Trust as successors to the MEBA Welfare Plan and MEBA Trust". (FF 75) This finding is concededly true and supports Bridge Bank's

position that it established a successor trust for the benefit of *its employees* pursuant to § 11.02 of the MEBA Trust. As the district court found, such a claim "prevented payment of the trust funds directly to the participants of the Failed Banks and their beneficiaries." (FF 75) As the court of appeals noted (Pet 15a, 17a n. 4), however, the remainder of the district court's FF 75, as well as its FF 70, 71, and 73 constitute erroneous conclusions of law founded on neither logic nor authority.

Even if Bridge Bank had misrepresented that it had become a participating employer in the MEBA Plan and Trust with respect to the retired and disabled employees of the Failed Banks (and that Petitioners had believed the misrepresentation), the essential element of detrimental reliance is absent. See *Lyng v. Payne*, 476 U.S. 926, 935 (1986) ("An essential element of any estoppel is detrimental reliance on the adverse party's misrepresentations.") If Petitioners had believed and relied upon Bridge Bank's alleged misrepresentations about becoming a participating employer, they would have accepted claims and paid benefits to Bridge Bank employees from March 29, 1939 until June 9, 1989, and then transferred the funds they allocated to the Failed Banks to the Bridge Bank Trust to continue those benefits, all as contemplated by § 11.02. Petitioners did not do either, or act to their detriment in any other way. Rather, they kept all the disputed funds. Interpreted in its best light, Petitioners' claim is only that they became paralyzed by the uncertainty created by Bridge Bank's allegedly conflicting representations. (Pet 7) Such a self-serving paralysis, justified or not, is not detrimental reliance.

The Proof of Claim filed by BANK ONE in the MCorp bankruptcy does not support Petitioners' claim of judicial estoppel. (Pet 22) The Proof of Claim specifically states that BANK ONE established the Bridge Bank Plan for

the benefit of former employees of the Failed Banks *employed by BANK ONE*. (Ex 75) Moreover, because the Proof of Claim was voluntarily withdrawn pursuant to Bankr. R. 3006, it has no judicial estoppel effect. *Sandstrom v. Chemlawn Corp.*, 904 F.2d 83, 86 (1st Cir. 1990).

Bridge Bank never intended to cover under its benefit plan anyone other than its own employees. Moreover, MCorp never intended to allow Bridge Bank to become a participating employer in its MEBA Plan. In truth, Petitioners conjured up a false "dilemma" to stall transfer of funds. Since those funds have now been spent, Petitioners seek to eliminate their own duty to provide future benefits to retired and disabled employees of the Failed Banks under the guise of requesting approval from the courts of their allocation scheme, and without joining those most interested in whether their actions were proper. The court of appeals correctly refused Petitioners' estoppel claim and interpreted the meaning of the ERISA documents in accord with their plain meaning.

II. The Court of Appeals Correctly Ordered Dismissal of the Case Below Even Though Fiduciary Instructions Were Sought as Alternative Relief Because Persons Whose Interests Would be Directly Affected By Such Instructions Had Not Been Joined As Parties.

Petitioners continue to seek relief in the form of instructions approving their previous actions designed to relieve the MEBA Plan from liability to the retired and disabled former employees of the Failed Banks without ever having joined the latter as necessary parties. Petitioners' own authority cited in support of their request for instructions recognizes that "[a]ll beneficiaries should be

made parties, unless they are otherwise adequately represented." Bogert & Bogert, *Law of Trusts and Trustees*, Section 559 at 165-6(2)(d) Rev. Ed. 1980. There are no parties to the current action who can adequately represent the interests of the retired and disabled former employees of the Failed Banks.

Federal Rule of Civil Procedure 19(a)(2) requires joinder of any person who claims "an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest." See *Pulitzer-Polster v. Pulitzer*, 784 F.2d 1305 (5th Cir. 1986)(dismissal of suit necessary where failure to join other persons might prejudice them by a negative precedent); *Hansen v. Peoples Bank of Bloomington*, 594 F.2d 1149 (7th Cir. 1979)(dismissal of suit seeking dissolution of a trust required in absence of joinder of all beneficiaries). Since the necessary parties for the relief sought by Petitioners were not joined in this action, it was appropriate for the court of appeals to remand for dismissal of this action, particularly as to the BANK ONE Respondents who have no interest in further instructions about the MEBA Trust.

III. The Stay Ordered by the Court of Appeals Pending Appeal Was Proper and Cannot Itself Constitute Reversible Error.

Petitioners' complaints about the court of appeals' grant of a stay pursuant to 12 U.S.C. § 91 are moot. In light of the court of appeals' reversal of the district court judgment, the stay no longer has any effect. Petitioners' argument should be rejected as there is no live controversy affecting the rights of litigants to the proceedings. *See Taylor v. McElroy*, 360 U.S. 709 (1959).

In any event, the court of appeals' stay of the district court judgment pursuant to 12 U.S.C. § 91 was proper. Section 91 states in pertinent part that "no attachment, injunction, or execution, shall be issued against such association or its property before final judgment in any suit, action or proceeding . . ." The § 91 prohibition against attachments, injunctions, or executions against a national banking association before final judgment has been a part of the federal statutes law since 1873.

Petitioners do not—and cannot—claim that the judgment in this case was final while it was being appealed. *See United States v. LeMaire*, 826 F.2d 387, 390 (5th Cir. 1987), *cert. denied*, 485 U.S. 960 (1988). Instead, Petitioners argue that § 91 is not applicable because the district court's declaratory judgment affects non-bank parties and did not order Respondents to pay any *specific* sum of money. As recognized by all parties, however, the district court's judgment created a significant monetary liability for BANK ONE as well as for the Bridge Bank Plan and Trust. The latter two entities, of course, receive all their funds from contractual commitments by BANK ONE. The relationships between the judgment debtors and the judgment obligations thus were so inextricably intertwined as to require a stay of all provisions to have any meaningful effect.

Declaratory judgments can be the equivalent of money judgments. *See Hebert v. Exxon Corp.*, 953 F.2d 936 (5th Cir. 1992) (district court abused its discretion in refusing to stay a declaratory judgment). The district court's judgment, if not stayed, would have required BANK ONE to fund a liability estimated at $125,000.00 per month. In fact, for the one month before the stay was obtained, BANK ONE paid that amount to the MEBA Plan in accordance with the district court's judgment.

The grant of the stay, as noted by the court of appeals, was designed simply to continue the status quo prior to entry of the district court's judgment. (Pet 4a) Regardless of the applicability of § 91, the stay was within the court of appeals' power as argued by BANK ONE in its Motion to Stay filed in the court of appeals. 28 U.S.C. § 1651; see also Fed. R. App. P. 8 and *Notes of Advisory Committee on Appellate Rules*. Since Respondents were successful in obtaining reversal of that judgment on appeal, the granting of the stay cannot itself constitute reversible error.

IV. The Court of Appeals Acted Within the Parameters of Its Judicial Power Obviating the Need for an Exercise of This Court's Powers of Supervision.

The court of appeals properly granted an interim stay of a judgment that it subsequently reversed. It also properly reviewed Petitioners' request for contract interpretation and declaratory judgment on a *de novo* basis. The court of appeals did not make fact findings; instead, it corrected erroneous conclusions of law. Finally, the court of appeals was not required to grant fiduciary instructions requested by Petitioners or remand the case for consideration of claims affecting 900 people who were not made parties to this action.

The court of appeals correctly interpreted the plain meaning of the documents forming the MEBA Plan and Trust. That court, like the district court, recognized the potential human impact of its decision by noting that it was "touched by the plight of the Subject Participants." It, however, properly confined its review to one of contract interpretation and found that Bridge Bank did not assume responsibility for welfare benefits for retired and disabled

former employees of Failed Banks who never become Bridge Bank employees.

Bridge Bank was not required to provide employee benefits of any type. It should not be penalized for providing benefits to its 7,000 employees by being required to assume liability for benefits to 900 other people whom it never employed. Bridge Bank contributed to the resolution of the Texas banking crisis by purchasing some of the assets of the Failed Banks. It did not, however, assume all of the liabilities of those Failed Banks. Many potential liabilities, including those relating to the funding of the MEBA Plan and Trust, if any, remained with the receiver for the Failed Banks to be satisfied according to the priorities set forth in federal law. Petitioners simply failed to pursue claims against those receiverships—their proper course for relief.

CONCLUSION

The court of appeals carefully reviewed the pertinent MEBA Plan and Trust documents and corrected erroneous conclusions of law. Bridge Bank could not have become a "participating employer" under the MEBA Plan and Trust because the terms of the documents precluded such a result. MCorp also blocked that result by refusing to approve Bridge Bank's participation. Moreover, Bridge Bank never adopted the terms of the MEBA Plan and Trust. Instead, it established a successor trust for the benefit of its active employees. By doing so, it did not inadvertently take on a $30 million liability for benefits to people it never employed. Since the court of appeals properly exercised appellate review of the judgment, the petition for writ of certiorari should be denied.

Respectfully submitted,

Peter F. Lovato, III

HOPKINS & SUTTER
3700 Bank One Center
1717 Main Street
Dallas, Texas 75201
(214) 653-2100
(214) 653-2255 (facsimile)

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HOPKINS & SUTTER
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1717 Main Street
Dallas, Texas 75201

APPENDIX A-1

MCorp

May 5, 1989

Peter B. Bartholow
Group Chairman
Planning and Finance

Deposit Insurance Bridge Bank
5th Floor
1717 Main Street
Dallas, Texas 75201

Attention: Mr. James B. Gardner

Please be advised that the Compensation Committee of our Board has adopted resolutions amending the MCorp MoneyMax Plan, the MCorp Pension Plan and the Mercantile Employees Beneficiary Association (VEBA). These resolutions and amendments clarify language in the plans and related trusts to reflect the original intention of the company as sponsor. The amendments clarify that an employing business entity is not permitted to be or become an adopting employer without application to and consent of MCorp, as the plan sponsor. The amendments adopted by the Compensation Committee also confirm that the Bridge Bank is not a "successor" or "successor employer" as such terms are used in the plan documents and related trust instruments. The resolutions make such other amendments to the plans as are necessary under the relevant law and appoint members to the Benefits Committee.

Thus, MCorp will consider any application for plan adoption that Bridge Bank wishes to make, subject to bankruptcy court approval requirements after a hearing on

notice to MCorp's creditors, stockholders and other parties in interest in MCorp's chapter 11 case.

Very truly yours,

(signature)

Peter B. Bartholow

PBB:sk

cc: Mr. Thomas T. Sieling
MTrust

P.O. Box 655415, Dallas, Texas 75265-5415
1717 Main, Dallas, Texas 75201, (214) 290 2000
MCorp Member MCorp

APPENDIX B-1

EXCERPTS FROM FIRST AMENDMENT TO THE MERCANTILE EMPLOYEES' BENEFICIARY ASSOCIATION TRUST AGREEMENT

THIS AGREEMENT made and entered into in the City of Dallas, State of Texas, by and between MCorp, a Delaware corporation, with its principle office and place of business in Dallas County, Texas (hereinafter sometimes called the "Company"), and MTrust Corp, N.A. (hereinafter referred to as the "Trustee").

W I T N E S S E T H :

WHEREAS, the Company (previously known as Mercantile Texas Corporation) established the Mercantile Employees' Beneficiary Association and entered into a trust agreement related thereto (the "Trust Agreement"), effective as of August 1, 1983;

WHEREAS, the Compensation Committee of the Company has authorized this First Amendment to the Trust Agreement to amend and supplement the Trust Agreement.

NOW THEREFORE, pursuant to the powers reserved in Section 10.01 of the Trust Agreement and for the purpose of consummating amendments of the Trust Agreement, the Company does hereby amend the Trust Agreement, effective as of March 28, 1989, so that such provisions shall read as follows, and, in consideration of the premises, the Company and Trustees do hereby agree:

APPENDIX B-2

I.

Article XI of the Trust Agreement is hereby amended, by deleting Section 11.02 therefrom and by substituting in lieu thereof the following Section 1102:

> 11.02 Continuation by Employer's Successor. Any corporation succeeding to the interest of an Employer by sale, transfer, consolidation, merger or bankruptcy, may elect to continue this trust by adopting this trust agreement and assuming the duties and responsibilities of the Plan, if approved by the Board of Directors of the Company, and this trust, or such corporation may establish a separate plan and trust for the continuation of benefits for its employees, in which event the trust assets, held on behalf of the employees of the prior Employer, shall be transferred to the trustee of the new trust, as, if, and when approved by the Board of Directors of the Company.

II.

Except as amended by this instrument, the Trust Agreement shall remain in full force and effect. This instrument may be executed in a number of counterparts, each of which shall be deemed to be an original even though the others are not produced and all of which collectively shall be deemed to be but one instrument.

IN WITNESS WHEREOF, this Amendment has been executed this 5th day of May, 1989, effective as of March 28, 1989.

(signatures deleted)

APPENDIX C-1

MCorp
A Momentum Company

June 5, 1989

VIA CERTIFIED MAIL

Mr. James B. Gardner
President
Deposit Insurance Bridge Bank, N.A.
1717 Main Street
Dallas, Texas 75201

Re: Response to Your Letters Dated May 10 Regarding the MCorp Benefit Plans

Dear Mr. Gardner:

Neither your letters of May 10 regarding adoption of the MCorp Pension and MoneyMax Plans nor the attached resolutions indicated any viable procedure to adopt the MCorp Pension Plan or the MCorp MoneyMax Plan (collectively, the "Plans") in a manner that comports with the requirements of the Plans' documents. With respect to both the MCorp Pension Plan and the MCorp MoneyMax Plan, the provisions in Section 14.05 of both Plans were never intended to apply to the situation of a bank newly formed by the FDIC. The amendments referred to in my letter of May 5, 1989 merely clarify what the documents already provided; namely that adoption of the Plans requires approval of the MCorp Board of Directors. Your attorney John Collins has informed us that your letters were not intended to and are not to be taken by MCorp as a request to the MCorp Board of Directors for approval of adoption of

the plans by Deposit Insurance Bridge Bank, N.A. ("Bridge Bank"). Accordingly, as no response is necessary by the MCorp Board of Directors, the Board has not taken any action with respect thereto.

Please be advised that the Trustee, actuary and recordkeepers for the Plans have been informed by MCorp that Bridge Bank is not a participating or an adopting employer of the Plans or their related trusts and does not exercise any authority with regard to such Plans. Furthermore, no benefits will accrue under either of such Plans with respect to service with Bridge Bank.

With regard to your letter requesting withdrawal from the MCorp Cafeteria Plan, the MCorp Cafeteria Plan for Part-Time Employees, the MCorp Dependent Care Plan and the MCorp Supplemental Health Care Plan (the "MCorp Welfare Plans"), there is no need for a waiver of the notice to withdraw from the MCorp Welfare Plans as Bridge Bank is not, and has never been, an Employer as defined in any of these Plans. Employees of the banks listed in your letter ("Former MBanks") ceased to be employees of a participating employer on March 29, 1989. Consequently, they will not be entitled to any benefits from plans funded under said trust incurred after March 28, 1989.

We are willing to discuss with you on behalf of all of the participating active and retired employees of the Former MBanks a transfer of assets and liabilities from the MCorp Employees Beneficiary Association Trust to a trust similarly qualified under Section 501(c)(9) of the Internal Revenue Code. Of course, a transfer of assets can occur only if there is a transfer of corresponding liabilities. Please let us know whom we should contact to discuss the transfer of assets and liabilities under the MCorp Voluntary Employees Beneficiary Association.

If you have any questions concerning this matter, please feel free to call the undersigned.

Very truly yours,

(signature)

Peter B. Bartholow

PBB:BARTO:1072

cc: Mr. John Collins

APPENDIX D-1

MCorp

June 20, 1989

MTrust Corp, N.A.
1717 Main, 12th Floor
Dallas, Texas 75201

Re: MCorp VEBA

Gentlemen:

You have requested guidance on your acceptance, as Trustee, of funds being paid to the trust for the Mercantile Employees' Beneficiary Association (the "VEBA") and on payment of funds from the VEBA. This letter is in response to that request and may be used by you in this connection until further notice. Capitalized terms not herein defined have their respective meanings in the VEBA Trust Agreement.

A. Payments to the VEBA:

1. Contributions:

You should not accept or put into the VEBA any contributions from Bridge Bank or any Bridge Bank subsidiary relating to any period of coverage after March 31, 1989.

2. Cobra Premium Payments:

You should not accept or put into the VEBA any premium payments for COBRA continuation coverage from any former employee of Bridge Bank or any Bridge Bank subsidiary who terminated employment after March 31, 1989.

B. Distributions from the VEBA:

1. Pre April 1, 1989 Claims:

All claims for expenses incurred on or before March 31, 1989 under plans funded through the VEBA should be paid irrespective of the Participant's current employer.

2. Post March 31, 1989 Claims for Active or Former Bridge Bank Employees:

Claims by active or former Employees of Bridge Bank which were incurred after March 31, 1989 for all plans funded through the VEBA should not be paid.

3. Post March 31, 1989 Claims by Retirees Who Retired On or Before March 31, 1989:

Until an agreement can be reached with Bridge Bank or you are given different instructions, please continue all payments to (and accept all premium checks from) retirees (and employees on long term disability) who retired or terminated employment on or before March 31, 1989.

4. COBRA Continuation Coverage for Former Employees Whose Termination of Employment Occurred on or Before March 31, 1989:

Please continue, as required by law to make payments for COBRA continuation coverage for all former Employees who terminated employment on or before March 31, 1989.

5. COBRA Continuation Coverage for Former Bridge Bank Employees whose Termination of Employment Occurred After March 31, 1989:

No payments for COBRA continuation coverage should be made for former Employees who terminated employment from Bridge Bank or a Bridge Bank Subsidiary after March 31, 1989.

Sincerely,

(signature)

Jim F. Taylor

cc: Ms. Riva T. Johnson
Ms. Mary Jean Potenzone

APPENDIX E-1

ADMINISTRATIVE SERVICES AGREEMENT

THIS ADMINISTRATIVE SERVICE AGREEMENT (the "Agreement") effective as of March 29, 1989 (the "Effective Date"), is between Bank One, Texas, National Association, formerly The Deposit Insurance Bridge Bank, National Association, ("Bank One") and MCorp, a Delaware corporation ("MCorp"). The purpose of this Agreement is to describe the duties and obligations of the parties and to insure that Bank One's relationship to MCorp is one of independent contractor.

W I T N E S S E T H:

WHEREAS, MCorp desires to utilize Bank One's knowledge and experience in administering, maintaining and managing certain benefit and compensation programs and payroll processing and accounting; and

WHEREAS, Bank One has agreed to provide MCorp certain services as an independent contractor in connection with the administration, maintenance and management of MCorp's and its affiliates' (i) benefit and compensation programs, including, but not limited to, Pension Plan, MoneyMax Plan, Cafeteria Plans, and welfare and qualified benefit plans (which include MCorp's group medical, supplemental health care plan, dependent care reimbursement plan, employee group term life insurance, long-term disability, group dental, business travel accident insurance, family life insurance, voluntary accidental death and dismemberment, sick pay and short-term disability) and (ii) payroll processing and accounting (all such services collectively referred to herein as "Human Resources Services");

NOW, THEREFORE, [illegible] premises and the mutual promises herein contained, the parties hereto agree as follows:

1. Administrative Services. Subject to the terms of this Agreement, Bank One shall provide certain Human Resources Services to MCorp. The Human Resources Services performed by Bank One shall consist of those being performed by Bank One for MCorp and its affiliates as of March 29, 1989. Bank One shall perform such Human Resources Services on substantially the same schedule as existed as of March 29, 1989 and the parties agree that Bank One and its agents will work free of supervision by MCorp, except as to the final result to the extent within general guidelines provided by MCorp and subject to the provisions of the relevant plans, management decisions and approvals. No substantial change shall be made in the scheduling of Human Resources Services and/or in Bank One's responsibilities with respect thereto without Bank One's prior written consent.

2. Term of Agreement. The term of this Agreement shall begin on the Effective Date and shall continue until terminated by thirty (30) days prior written notice by either party. From time to time, without terminating this Agreement, the Human Resources Services to be provided hereunder may be modified to include other services or eliminate one or more services (with appropriate adjustment of fees for services) by the mutual written agreement of Bank One and MCorp.

3. Fee for Services. MCorp shall pay Bank One $3,100 per week as remuneration for Bank One's services hereunder during the term of this Agreement.

4. Reimbursement for Expenses. During the term of this [illegible] shall also reimburse Bank One for payments made by Bank One to third parties reasonably resulting from requests by MCorp for special services hereunder (which special services are not of the nature previously regularly provided by Bank One to MCorp for periodic fees and without such reimbursement) upon submission and approval of expense statements and other supporting information in accordance with the general accounting policies of MCorp, as MCorp may adopt from time to time. In the event goods or services provided by such third parties benefit Bank One as well as MCorp, MCorp shall only be obligated hereunder to reimburse Bank One for a reasonable portion of payments related thereto (which portion shall, to the extent appropriate, be a percentage of such payments equal to the percentage that MCorp personnel, to which such special services relate, constitute of all personnel, to which such special services relate).

5. Continuing Cooperation by MCorp. Bank One's obligations under this Agreement are specifically conditioned upon the continuing cooperation by MCorp and its affiliates in making available to Bank One (i) specific information, (ii) the COBRA Administration System and Reimbursement-Account Administration System, licensed by The Wyatt Company to MCorp (the "Wyatt Software") and (iii) the HR Plus Payroll System, licensed by McCormack & Doge Corporation to MCorp (the "M&D Software"), as necessary for Bank One to provide the services described in Section 1 above. MCorp agrees to permit Bank One to continue to use the Wyatt Software and M&D Software, and Bank One will only use the Wyatt Software and M&D Software in order to provide Human Resources Services hereunder. Notwithstanding the foregoing, MCorp shall not have any obligation whatsoever to provide Bank One any

information or other cooperation or permit Bank One to use the Wyatt Software or M&D Software to the extent MCorp is precluded by reason of legal, accounting or regulatory requirements beyond its [illegible] any reason whatsoever, to provide such information or other cooperation or permit such use shall not be a default hereunder or the basis or any claim by Bank One for damages or other amounts and, in the event of any such failure, shall only excuse Bank One's performance of its obligations under this Agreement to the extent such performance is reasonably precluded by such failure. Bank One shall promptly notify MCorp of any such failure.

6. Confidentiality. Bank One acknowledges that all information provided to Bank One by MCorp or its affiliates, whether before or after the Effective Date, including, but not limited to, data relating to any employee or benefit or compensation package of MCorp or its affiliates, salary or other payroll information and the Wyatt Software and M&D Software (collectively "Confidential Information"), shall be and remain MCorp's property and was received by Bank One in strict confidence. Bank One agrees that, except as specifically authorized in writing by MCorp, Bank One will not, and will cause its officers, employees and agents not to (i) disclose any Confidential Information to any person or entity, (ii) make use of any Confidential Information for its own purposes (except as necessary or convenient to perform its obligations under this Agreement), or for the benefit of any other person or entity, other than MCorp or its affiliates or (iii) use such Confidential Information in a manner violative of applicable law or regulatory requirements. Upon termination of this Agreement or on such earlier date as MCorp requests or the same is no longer required by Bank One in order to perform its obligations pursuant to this Agreement, such Confidential

Information shall promptly be returned to MCorp by Bank One.

7. [Illegible] duties and obligation under this Agreement, the parties hereto acknowledge that Bank One is acting as an independent contractor. This Agreement shall not be interpreted as to create an employer-employee relationship between Bank One and MCorp or between MCorp and any employee of Bank One. Bank One shall have no authority to act for or represent MCorp in any way or otherwise be deemed an agent of MCorp or enter into agreements on behalf of MCorp, settle any claims against MCorp, represent itself as acting on behalf of MCorp or otherwise bind MCorp. Bank One shall be responsible for all federal, state and local income taxes, unemployment taxes, social security contributions, worker's compensation premiums and all other taxes and payments with respect to the services of its employees rendered under this Agreement.

8. Hold Harmless. MCorp shall forever protect, save and keep Bank One, its officers, directors, and employees, harmless and indemnify Bank One, its officers, directors, and employees, against and from any loss, costs, liability, expense, suits or actions, judgments and liabilities of any kind (including payment of reasonable attorney fees) arising out of or in any manner connected with the performance of services under this Agreement other than those arising from the willful misconduct or gross negligence of Bank One or such officers, directors and employees; provided, however, that this Section 8 shall not apply unless Bank One notifies MCorp promptly of any matters in respect of which the foregoing may apply and of which Bank One has knowledge and gives MCorp full opportunity to control the response thereto and the defense thereof, including, but not limited to, any agreement relating to the settlement thereof. In accordance with the foregoing indemnity, MCorp

shall provide a defense for, or reimburse all costs of defense incurred by, Bank One's officers, directors and employees in any such suit or action in the event MCorp and Bank One agree, in good faith, that it appears that such suit or action did not arise out of and was not in any manner connected with the willful misconduct or gross negligence of Bank One or its officers, directors or employees.

9. Notices. Any notice required or permitted to be given pursuant to this Agreement shall be effective on the date of receipt, and shall be in writing and either hand delivered or mailed by registered or certified mail, return receipt requested, to the appropriate party at the address shown below:

If to Bank One:

Bank One, Texas, National Association
1717 Main Street, 5th Floor
Dallas, Texas 75201

Attention: James B. Gardner

If to MCorp:

MCorp
1717 Main Street
1900 Momentum Place
Dallas, Texas 75201

Attention: Jimmy F. Taylor

10. Waiver and Amendment. No waiver or modification of this Agreement or of any covenant, condition or limitation herein contained shall be valid unless in writing and duly executed by both Bank One and MCorp.

11. Entire Agreement. This Agreement contains the entire agreement between Bank One and MCorp and

constructed in accordance with prior agreements, negotiations and understandings as to the subject matter hereof. As of the Effective Date, all Human Resources Services provided by Bank One to MCorp or its affiliates shall be deemed to have been performed pursuant to this Agreement and the parties acknowledge that no other agreement, whether oral or written, or fees shall be applicable thereto or payable therefore.

12. Agreement Binding. The provisions hereof shall inure to the benefit of, and be binding upon, and be enforceable by the parties hereto and their respective successors and assigns. In the event of a sale of the stock or substantially all of the assets of Bank One, Bank One will cause the purchaser to assume all obligations pursuant to this Agreement.

13. Assignment. This Agreement shall not be assignable or transferable by either party except by the written consent of the other party.

14. Titles. The titles of the sections of this Agreement are for convenience of reference only and are not to be considered in construing this Agreement.

15. Severability. If any provision of this Agreement shall be held to be invalid, illegal or unenforceable, such provision shall be fully severable, and the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

16. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Texas. Venue and jurisdiction for an action under this Agreement shall be in Dallas County, Texas.

17. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which shall together constitute one in the same Agreement.

IN WITNESS WHEREOF, this Agreement is hereby executed as of this 22 day of August, 1989.

BANK ONE, TEXAS, NATIONAL ASSOCIATION:

James B. Gardner

By: James B. Gardner

Title: Vice Chairman

MCORP:

Peter B. Bartholow

By: Peter B. Bartholow

Title: Group Chairman